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June 17

THE
TEXAS CIVIL APPEALS REPORTS

CASES ARGUED AND ADJUDGED

IN

THE COURTS OF CIVIL APPEALS

OF

THE STATE OF TEXAS

DURING

APRIL, MAY, JUNE AND OCTOBER, 1906

A. E. WILKINSON
REPORTER TEXAS SUPREME COURT

J. A. MARTIN
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Fischer v. Giddings, 393.....Refused.
Fowler v. Agnew, 540.....Refused.
Franklin County v. Huff, 355.....Dismissed.
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TEXAS CIVIL APPEALS REPORTS.

APRIL, 1906.

W. B. SKIRVIN v. GEORGE W. O'BRIEN.

Decided April 18, 1906.

1.—Power of Attorney by Husband and Wife—Death of Husband.

A power of attorney, jointly and duly executed by husband and wife to sell the wife's separate property, is not revoked by the death of the husband.

2.—Ratification.

The burden of proving ratification is on the party asserting it. There can be no ratification without full knowledge of the facts. Ratification of deed of agent must be by deed of principal. Mere delay in repudiating will not have the effect of ratifying.

3.—Powers of Attorney—Strict Construction.

Such instruments as powers of attorney must be strictly construed; under no circumstances will the principal be bound beyond the plain import of the language of the instrument. A power to sell and convey does not authorize a conveyance in settlement of adverse claim against principal.

Appeal from the District Court of Jefferson. Tried below before Hon. L. B. Hightower.

Xavier Ryan, for appellant.—The death of one joint principal revokes the authority of an agent. Cox v. Bray, 28 Texas, 248; Conner v. Parsons, 30 S. W. Rep., 83; 1 Am. and Eng. Ency. of Law, pp. 12-23 (2d ed.); Travers v. Crane, 15 Cal., 12; Johnson v. Wilcox, 25 Ind., 182; Marlet v. Jackman, 3 Allen, 287 (Mass.); Lourie v. Salz, 75 Cal., 353; Galt v. Galloway, 4 Peters, 333.

The ratification of the unauthorized act of an agent will not be presumed by failure of the principal to disaffirm the act. The burden of proving ratification of the unauthorized act of the agent devolves upon the party asserting it and there can be no binding ratification without full knowledge. Reese v. Medlock, 27 Texas, 123; Storey on Agency, sec. 90.

Powers of attorney, unlike deeds and wills, are to be strictly construed. The authority delegated is limited to the meaning of the terms in which it is expressed, and when the power to perform specific acts is given and general words are also employed, such words are limited to the

particular case authorized. Frost v. Erath Cattle Co., 81 Texas, 505; 1 Devlin on Deeds, sec. 358; Billings v. Morrow, 68 Am. Dec., 235; Mech. on Agency, secs. 318, 326, 329; 30 Cal., 408.

O'Brien, John & O'Brien, for appellee.—A husband is only a formal party to a conveyance made by a wife under coverture of her separate estate; the purpose being to assure her the benefit of his council and advice, and the purpose of the privy acknowledge is to guard her against undue influence on his part. Nolan v. Moore, 72 S. W. Rep., 583; Tippett v. Brooks, 67 S. W. Rep., 512; Schley v. Pullman Car Co., 25 Fed. Rep., 890; Bray v. Clapp, 6 Am. St. Rep., 197.

An unauthorized act performed by an agent is assumed to have been ratified by long acquiescence. Glasscock v. Nelson, 26 Texas, 151; Ward v. Williams, 79 Am. Dec., 385.

A power of attorney authorizing an agent to sell for money or other consideration, and not only to grant and sell, but to confirm title to land in others is sufficient to authorize a conveyance in consideration of a locative interest.

FLY, ASSOCIATE JUSTICE.—This is an agreed case under article 1414, Revised Statutes. The agreement is as follows:

"We, the parties to the above styled and numbered cause, whose names are signed hereto, being all of the parties to this suit, hereby agree that the following is a brief statement of this case and of the facts proven on the trial hereof:

"1. This is a suit of trespass to try title, filed in the District Court of Hardin County and transferred by agreement of parties, to Jefferson County. The land in controversy is 160 1-3 acres out of the E. Pulsifer 1-3 league in Hardin County, Texas, plaintiff's petition is in regular statutory form and defendant's answer is general denial and plea of not guilty.

"2. The following facts were proven:

"The land in controversy was located by virtue of a certificate issued to the heirs of Ebenezer Pulsifer, who died some time in the fifties. His heirs were Lucy E. Granger, his sister, and Joseph P. Pulsifer, his brother, who died in the sixties leaving Lucy E. Granger, his heir also. Lucy E. Granger and her husband, Geo. T. Granger, are the common source of title of the parties to this cause.

The plaintiff holds under general warranty deed, executed and delivered to him in August, 1903, by all the heirs of Lucy E. Granger and Geo. T. Granger.

The defendant holds under a warranty deed, executed and delivered to him on April 14, 1874, and duly filed for record July 28, 1874, and recorded in deed records of Hardin County, Texas, volume F, page 324 on the 19th day of August, 1874, executed by Geo. T. Granger and Lucy E. Granger, acting by and through their agent and attorney in fact, T. J. Russell. It was proven also that there had originally existed a contract in writing between Lucy E. Granger and Joseph Pulsifer, as sole heir of Ebenezer Pulsifer with A. H. Reading, but that said contract after diligent search had been lost, but its terms were shown to have been substantially that upon A. H. Reading locating said land

and paying the expenses for locating the same, that he should have a locative interest equal to 1-3 of said land, that said locative interest so earned or to be earned by A. H. Reading was owned, at the time of the conveyance by T. J. Russell to G. W. O'Brien, by the said G. W. O'Brien and R. H. Smith jointly and in the proportion in acreage as was conveyed to them respectively by said T. J. Russell as agent and attorney, to said G. W. O'Brien and R. H. Smith.

On the 23d day of January, 1871, Geo. T. Granger and his wife, Lucy E. Granger, who then resided in Galveston, Texas, executed and forwarded to Tom J. Russell, who then resided in Beaumont, Jefferson County, Texas, the following instrument:

"The State of Texas, }
County of Galveston. }

"Know all men by these presents: that we, Geo. T. Granger and Lucy E. Granger, of said county of Galveston, do hereby and herein appoint, constitute and confirm Tom J. Russell, attorney at law of the county of Jefferson, State aforesaid, our agent and attorney in fact for us and in our names to bargain, sell and convey, lease, rent and confirm to any person or persons, and for any sum of money or other consideration, as to him may seem most to our advantage, all tracts or parcels of land lying and being situated in the county of Hardin, State of Texas, and to all lots, blocks or parts thereof of land lying and situated in the town of Beaumont, county of Jefferson, State aforesaid; to receive the consideration for which the sale of said tracts or parcels of land or town lots may be made, and for the same to execute in our name proper receipts and acquitances, and to make and execute to the purchaser or purchasers good and valid deeds and titles to such tracts or parcels of land or town lots, which such covenants and warrants as to our said agent or attorney may seem proper, whose acts in the premises we hereby ratify.

"Witness our hands and scroll seals this 23d day of January, 1871.

George T. Granger, (Seal).
Lucy E. Granger, (Seal)."

The said power of attorney was duly and legally acknowledged by Geo. T. Granger and Lucy E. Granger on the day of its execution, before Edward T. Austin, notary public, Galveston County, Texas, and was duly filed for record by clerk of Hardin County, Texas, July 28, 1874, and recorded in Hardin County, Texas, on the 19th day of August, 1874, in volume "A" records of said county, pages 76 and 77. The lands mentioned in the foregoing power of attorney were the separate estate of Lucy E. Granger by inheritance, as sole heir of Ebenezer and Joseph Pulsifer.

It was shown that Geo. T. Granger owned no individual estate whatsoever in either Hardin or Jefferson County, nor did he and Lucy E. Granger ever own any community estate located in said counties. The power of attorney above set forth was sent from Galveston to Beaumont by Geo. Granger, to the said attorney, T. J. Russell, and the said Geo. Granger, who was a son of Geo. T. Granger and Lucy E. Granger, conducted all the correspondence both before and subsequent to the execu-

tion of the power of attorney by his father and mother to T. J. Russell, and according to the testimony of his sister generally acted for his father and mother in the transaction of such business as any other son would do. Among the letters received by T. J. Russell from Geo. Granger in behalf of his father and mother, one dated August 16, 1872, contained the following statement, to wit: "The survey of land in Hardin County was for the heirs of Ebenezer Pulsifer, deceased, mother and uncle were the heirs on certificate obtained by the late Judge Junker when in the Legislature in 1854 or 1855 and was then given to A. H. Reading to lay or locate, pay all expenses, obtain patent and receive 1-3 for his pay, receiving deed for the 1-3 from mother and uncle, the whole certificate was for 1-3 of a league."

It was further shown that contemporaneous with the execution of the deed by Geo. T. Granger and Lucy E. Granger to G. W. O'Brien for the 160 1-3 acres of land in controversy, that a deed was executed to R. H. Smith for a tract of land, the acreage of which if added to that conveyed to G. W. O'Brien made an acreage equal to the 1-3 locative interest.

It was further shown that R. H. Smith and G. W. O'Brien were the owners and entitled to whatever locative interest A. H. Reading may have owned by reason of locating the 1-3 of a league known as the Ebenezer Pulsifer 1-3 league in Hardin County, out of which the land involved in this suit is taken.

It was further shown that G. W. O'Brien obtained the patent on March 9, 1874, for the entire 1-3 league patented to Ebenezer Pulsifer from the General Land Office and paid the patent fees due.

It was further shown that all the instruments, that is to say, the patent, the conveyance to Geo. W. O'Brien and the conveyance to R. H. Smith, were filed for record on the same day and at the same hour.

It was further shown that subsequent to the conveyance to the defendant, G. W. O'Brien and to R. H. Smith, that the said Lucy E. Granger and Geo. T. Granger never rendered for taxes nor paid taxes on the 500 acres so conveyed respectively to G. W. O'Brien and the defendant in this case, and to R. H. Smith.

It was further shown that on the 23d day of January, A. D. 1889, the said heirs of Lucy E. Granger made, constituted and appointed Henry C. Mayer their agent and attorney to clear the title to the Pulsifer land and to convey the same; and it was proven by Henry C. Mayer that at the time he was appointed attorney that he was told by A. Wakelee, a husband of one of the heirs and who employed him as attorney for the balance, that the heirs had conveyed the locative interest of 500 acres to G. W. O'Brien and R. H. Smith, and that his employment was not in reference to that which had been conveyed to O'Brien and Smith.

It was further shown that T. J. Russell, the attorney who conveyed the land for Lucy E. Granger and Geo. T. Granger to Geo. W. O'Brien, never knew or corresponded directly with them, but had all of his correspondence with their son, Geo. Granger, and in corresponding with them about the land would write to Geo. Granger explaining the transaction, about the date of same and about the transaction he had had and the conveyance he had made to Geo. W. O'Brien and R. H. Smith for the locative interest and does not remember whether he received a reply from

Geo. Granger approving the same or not, but knows that up to the filing of this suit he never heard his action questioned or repudiated by either Geo. T. Granger or Lucy E. Granger or the heirs of said Geo. T. and Lucy E. Granger.

On April 14, 1874, said T. J. Russell, as agent and attorney of Geo. T. and Lucy E. Granger, and in their name and acting under the power of attorney given him by them on January 23, 1871, executed a general warranty deed, reciting the consideration of $160 and conveying 160 1-3 acres as described by metes and bounds in plaintiff's petition, of the E. Pulsifer 1-3 league to said defendant G. W. O'Brien, which said deed was on the 28th day of July, A. D. 1874, filed for record and thereafter duly recorded in deed records of Hardin County, Texas, volume F, page 324, that all of said conveyances antedate and were of record long anterior to the conveyance made by the heirs of Geo. T. and Lucy E. Granger to the plaintiff herein; that although said deed recited a cash consideration of $160, yet it was shown that the consideration of said deed, together with the contemporaneous deed of like nature and character, executed by said Russell to R. H. Smith was in consideration of the locative interest so earned by A. H. Reading and which was, at the time of said conveyance, made by said Russell as agent and attorney, to R. H. Smith and G. W. O'Brien, owned by R. H. Smith and G. W. O'Brien and in the proportion as the acreage in said two deeds bears to each other. Geo. T. Granger died on the 1st day of January, 1874, and had therefore been dead three and one-half months when on April 14, 1874, the deed in the name of himself and wife was executed and delivered by Tom J. Russell, their agent in said power of attorney, to defendant Geo. W. O'Brien conveying the land in controversy.

It was further shown that at the time said conveyance was made by T. J. Russell to said G. W. O'Brien and R. H. Smith that the said T. J. Russell, the attorney, and the said G. W. O'Brien neither knew that the said Geo. T. Granger was dead, nor did they learn of his death until many years after. Lucy E. Granger died in 1876 and Geo. Granger, son of Lucy E. Granger and George T. Granger, died a few years later. An outstanding title against plaintiff to one-half interest in said land in Henry C. Mayer was shown by defendant on the trial.

The following issues of law were involved in this case:

1. Did the death of George T. Granger, who, with his wife, Lucy E. Granger, were principals in the power of attorney appointing Tom J. Russell agent to sell the wife's separate property, revoke the authority of said agent to act under said power of attorney? And was the conveyance of the property in controversy to defendant by said agent Tom J. Russell, acting under said power of attorney after the death of one of his principals, void?

2. If said conveyance was not void, but only voidable, was there a sufficient ratification to make it binding on Lucy E. Granger or her heirs?

3. Did said power of attorney, by its terms, authorize Tom J. Russell to convey said land to defendant in consideration of a locative interest which said Russell believed to exist and to be owned by defendant G. W. O'Brien?"

It is the settled rule in Texas that a married woman may dispose of

her separate estate or homestead, through a power of attorney in which she is joined by her husband. (Patton v. King, 26 Texas, 685; Warren v. Jones, 69 Texas, 462; Jones v. Robbins, 74 Texas, 615; Cannon v. Bontwell, 53 Texas, 626.) The power of attorney, being executed and acknowledged as required by law by Mrs. Lucy E. Granger and her husband, was therefore a valid instrument. The property was her separate estate and, as said in Patton v. King: "In regard to her separate property, a married woman is generally treated as a *feme sole*. The acknowledgment by the statute is for her protection; and when that is made to the power of attorney, the object of the statute has been as effectually attained as if made to her deed of conveyance." The power of attorney was vitalized by the signature and acknowledgment of the husband and his death did not have the effect of withdrawing the vitality given to it. If Mrs. Granger had died, of course the power of attorney would at once have become null and void, but the husband owned no interest in the land and his death could not affect the force and effect of the power of attorney given by his wife. We conclude that the death of the husband did not revoke the power of attorney executed by the husband and wife, which authorized the sale of the separate estate of the wife.

We do not think there was any evidence of ratification of Russell's act in making the deed to O'Brien on the part of Mrs. Lucy E. Granger or her heirs. If the son of Mrs. Granger was informed of the execution of the deed, it was at a time when he could not ratify the deed because his mother was then living and she alone had the power of ratification. The burden of proving ratification rested on the party asserting it, and while assent may be presumed, in some cases, yet there can be no ratification without full knowledge of the facts. A letter may have been written by Russell to George Granger, but there is nothing to indicate that he received it. He did not reply to any such letter. (Reese v. Medlock, 27 Texas, 120.)

It is the general rule that where an agent makes a deed to land of his principal without authority to do so, a ratification of his act must be by deed of the principal. Mere assent, or such acquiescence as would show assent, is not a ratification. (Zimpleman v. Keating, 72 Texas, 318; Etheridge v. Price, 73 Texas, 597.) If this case could be held to be an exception to the general rule and ratification may be shown by assent and other circumstances, the proof has not been supplied. As said in Meyer v. Smith (Texas Civ. App.), 21 S. W. Rep., 997: "Mere delay in repudiating will not, in our opinion, have the effect of ratifying."

It is so well settled as to be elementary, that such instruments as powers of attorney must be strictly construed, and that under no circumstances will the principal be bound beyond the plain import of the language of the instrument. (Gouldy v. Metcalf, 75 Texas, 455; Frost v. Erath Cattle Co., 81 Texas, 505.) In accordance with this rule it is settled that a power to convey lands does not authorize a conveyance in exchange or partition of lands; that a power to sell does not authorize the agent to barter for other property, and that a power to sell and convey does not include the power to convey in discharge of a debt or a claim.

In the Frost case, above cited, the power of attorney authorized the agent, among other things, "to make contracts for the sale of any and all tracts of land" owned by the principal in Texas, "to execute full and sufficient deeds of conveyance" to any person to whom he sold and generally to manage the business of the principal. The agent, by virtue of the power of attorney executed to a third person a deed to certain land in settlement of claims set up by that person to lands belonging to the principal. The court said: "It sufficiently appears from the recital in the deed that the transaction therein referred to was the settlement of some interest held or claimed by Mrs. Rebecca De Cordova in the lands of Richard B. Kimball, or the proceeds of them. The transaction was plainly not a sale. 'A sale is defined to be an agreement by which one of two contracting parties, called the seller, gives the thing and passes the title to it for a certain price in current money.' . . . 'It differs from accord and satisfaction, because in that contract the thing is given for the purpose of quieting a claim and not for a price.' . . . The deed in question excludes and negatives the idea of price or money paid. Under the terms of the power of attorney, was Richard Kimball, the agent, authorized to execute deeds in discharge or adjustment of adverse claims preferred by Rebecca De Cordova against Richard B. Kimball?" The court answered the question in the negative. The same ruling has been made in other cases. (Smith v. Powell, 5 Texas Civ. App., 380; Folts v. Ferguson, 24 S. W. Rep., 657; Kent v. Cecil, 25 S. W. Rep., 715; Morton v. Morris, 66 S. W. Rep., 94.) The opinion in the last case was rendered by this court, through Associate Justice Neill, and the subject is thoroughly discussed.

In this case the agent was authorized "to bargain, sell and convey, lease, rent and confirm to any person or persons, and for any sum of money or other consideration, as to him may seem most to our advantage, all tracts or parcels of land lying and being situated in the county of Hardin, . . . to receive the consideration for which the sale of said tracts or parcels of lands or town lots may be made, and for the same to execute in our name proper receipts and acquittances, and to make and execute to the purchaser or purchasers good and valid deeds and titles, etc." There is no authority granted in the instrument to make deeds in settlement of claims of parties to the land of the principals, but the language clearly points to but one conclusion and that is, that the principals contemplated and intended to confer no power except that of a sale and the collection of the purchase money.

The judgment is reversed and here rendered in favor of appellant.

Reversed and rendered.

J. B. BRENNAN & SON v. DANSBY & DANSBY.

Decided April 20, 1906.

1.—Traveling Salesman—Authority—Evidence.

Facts considered, and held to warrant the defendants in assuming, from their course of dealing with plaintiffs through their salesman, that said salesman had full authority to bind plaintiffs by the contract of sale without submitting the same to plaintiffs for their approval.

2.—Contract—Repudiation.

It is incumbent on a principal to repudiate promptly a contract which his agent may undertake to make, but which is beyond the scope of such agent's apparent authority.

Appeal from the County Court of Brazos County. Tried below before Hon. A. G. Board.

Lamar Bethea and *J. R. Astin,* for appellants.—The verdict and judgment are contrary to the law and the evidence. Baker & Co. v. Kellett-Chatham M. Co., 84 S. W. Rep., 661; Iron City Nat. Bank v. National Bank, 47 S. W. Rep., 535; Nations v. Thomas, 25 Texas Sup., 224; Ransom v. Alexander, 31 Texas, 447; Flomerflet v. Hume, 31 S. W. Rep., 679.

It was the duty of plaintiff to enquire and ascertain the fact and extent of the salesman's authority. Baker & Co. v. Kellett-Chatham M. Co., 84 S. W. Rep., 661; Whitaker v. Zeihme, 61 S. W. Rep., 499; Green v. Hugo, 81 Texas, 457; Houston & T. C. Ry. Co. v. Hill, 63 Texas, 384; Rail v. City Nat. Bank, 22 S. W. Rep., 865.

J. S. Ford and *M. Nagle,* for appellees.—The principal is responsible for the unauthorized acts of his agent where the conduct of the principal justifies a party dealing with the agent in believing that such agent was acting within and not in excess of the authority conferred on him. Strozier v. Gus. Lewey & Co., 3 W. & W. Civ. Cases, secs. 129 and 131; Lillard v. Mitchell, 3 W. & W. Civil Cases, sec. 457; Baker v. Kellett, 84 S. W. Rep., 661; Banks v. Everest, 35 Kan., 687; Potter v. Springfield Milling Co., 75 Miss., 532.

Even in cases where the contract of the agent is subject to the ratification or rejection of his principal, the principal must either accept or reject said contract in toto. He can not ratify a part and reject the balance. Henderson v. San Antonio & Mex. Gulf Ry. Co., 17 Texas, 560; Thorn v. Dill, 56 Texas, 145.

Evidence of similar prior contracts made by agents of plaintiffs with defendants was admissible to show what authority the defendants were authorized in assuming that the agent in question possessed. Banks v. Everest, 12 Pac. Rep., 141.

REESE, ASSOCIATE JUSTICE.—J. B. Brennan & Son sued Dansby & Dansby in the Justice Court upon open account for flour, sold by plaintiffs to defendants, amounting to $154.68. Defendants admitted the debt, but pleaded as an offset and counter claim a demand against plaintiffs growing out of the breach of contract for sale of three cars of flour bought of plaintiffs by defendants, which plaintiffs had failed and refused to deliver; defendants claiming the difference between the market price at the time and place of delivery and the contract price, amounting to forty cents per barrel, also ten cents per barrel commissions which it was alleged plaintiffs had agreed to allow, in the aggregate $187.50.

On trial in the Justice Court defendants had judgment for costs, the court adjudging that the parties were mutually indebted to each other upon the respective demands pleaded in the sum of $154.68.

Upon appeal by plaintiffs to the County Court the case was tried without a jury and a like judgment rendered, from which plaintiffs appeal. No conclusions of fact and law were filed.

The facts are as follows: Appellants are merchant millers at Sherman, Texas, and appellees are grocery merchants at Bryan, Texas. On January 12, 1903, George A. Benedict, appellants' traveling salesman, called upon appellees at their place of business in Bryan and sold them (for appellants) five cars of flour to be shipped one car per month, the first car to be shipped January 20. The contract was in writing, written upon a printed order blank of plaintiffs, which the salesman had with him, and was signed by appellees and Benedict in duplicate. The order contained the stipulation, "Prices guaranteed against decline," which means that if flour went up it was not to affect the contract price, and if prices declined appellees were to get the benefit of the decline.

Upon receipt of the order appellants wrote to appellees on January 14 acknowledging receipt and thanking them for the order. Nothing was said in the letter about Benedict's authority to make a binding sale, or that his authority was limited to taking orders subject to appellants' approval, but the letter contains, with regard to the order, the following:

"We notice that he has written in the order that one car per month is to be shipped. We can not understand why he has done this and believe that he has surely made an error as it is unreasonable to suppose that we can sell goods five months in the future at today's prices notwithstanding the advancing tendencies in the market. We will, however, be willing to allow in your case 45 days in which to order out the goods, and in case that at the end of that time you had not ordered out the last car we would be willing to grant you a few days extension, the same as we did with the last contract with you, but we could not afford to have it understood that you were to have five months time in which to order the goods out."

To this letter appellees did not reply, and in February ordered the first car, which was shipped as ordered. On February 23 appellants wrote as follows:

"We notice that you have only given us shipping instructions for one car to apply on your purchase on January 12, and at this rate you will see that it will require at least five or six months in which to complete the contract. We wish to be as reasonable as possible with you and you can readily see that we can not accept orders for shipment as far as 5 or 6 months in the future. And we will ask that you think this matter over and if you find you can not order out the rest of these cars within a reasonable length of time to advise us what you think best to be done in the matter."

On March 11 appellees ordered the second car, which was shipped as ordered. Appellants then refused to ship the three remaining cars, whereupon appellees charged them up with the difference between the contract price and the market price and remitted the balance due them on account, leaving a balance due as claimed by appellants of $154.68.

Appellees had been buying flour from appellants, through their traveling salesman, just as this bill was bought, for several years, giving the salesman an order for the amount and kind desired, which orders had

always been promptly filled. The course of dealing was such as to lead appellees to believe that such salesmen had full authority to make a binding sale for appellants, and there had been nothing to bring to appellees' notice or knowledge that the salesmen with whom they had dealt were not so authorized, or that their authority was limited to taking orders subject to the approval of appellants. While appellees had never before bought a bill the delivery of which was to run over sixty days, they had, at least, on one occasion bought a bill the delivery of which was to extend that long, but in which they were allowed three and one-half months in which to order shipment; and they had several times bought under a contract stipulating, "prices guaranteed against decline" without objection on the part of appellants. Appellees had never bought of Benedict before, but Benedict's authority was the same as that of other traveling salesmen, so far as the evidence shows. He was a regular traveling salesman of appellants, and remained in their service as such for more than a year after this transaction, and until a few days before his death.

Members of appellants firm testified that Benedict and other traveling salesmen had no authority to make a binding sale, and that their authority was limited to taking orders subject to the approval of appellants. This evidence was not contradicted.

The first assignment of error attacks the judgment as being without evidence to support it, and against the great weight and preponderance of the evidence.

Appellants contend that appellees were bound to take notice of the limitations upon Benedict's authority, and especially that this sale was so unusual in its terms and such a disadvantageous one for appellants, in the circumstances, the price of flour rising all the time, that appellees were bound to know that Benedict was not authorized to make such a sale.

The only thing unusual about the sale was the long time, five months, in which appellees were allowed to order the flour, at the rate of one car per month. The "guarantee against decline" was not material in a rising market, but could only be material in case prices went down.

It is clear that the sale, giving appellees so long a time to order the flour at the contract price, which they had a right to do without the stipulated guarantee against decline, was probably an unusual sale; but considering the course of dealing between appellees and appellants, through traveling salesmen of the latter, it was not so unusual as that it must have created suspicion in the minds of appellees that Benedict was not authorized to make it, or to arouse inquiry in their minds as to this fact. Such a sale was fairly within the scope of such authority as appellees had a right to assume that Benedict possessed. Unquestionably they had a right to assume from their course of dealing with appellants, through their salesmen, that Benedict had full authority to bind appellants by a sale of flour, without submitting the offer of a purchase to appellants for approval, and there was, we think, nothing about this particular sale to lead them to believe or to suspect that it was such a sale as Benedict was not authorized to make.

The letter of January 14 did not amount to a repudiation of the sale,

or a distinct denial of Benedict's authority to make a sale. Complaint is made only of the length of time allowed appellees to move the flour.

It was incumbent upon appellants if they denied Benedict's authority to make sales, except subject to their approval, and did not approve this one, to so inform appellees distinctly. If the contract as written was not binding on them, there was no contract at all, and appellants should not have been content merely to complain of the length of time allowed, thus seeking to hold on to a part of it while protesting against some of its terms, but should have promptly stated to appellees that they would not ship the flour under this contract. Appellees were justified in treating this letter as a complaint on the part of appellants, and not a repudiation of the contract. Nor can their ordering the flour after the receipt of this letter be considered as an acquiescence in the new terms suggested by appellants. Besides, appellees having no notice of the limitations upon Benedict's authority, and appellants having by their previous conduct so acted as to justify appellees in believing that he had full authority to make the sale, it was not in the power of appellants to repudiate the contract after it was so made, if they had promptly and clearly undertaken to do so.

The assignment of error presenting this question must be overruled.

Appellants also object to the ruling of the court in allowing appellees to testify as to other sales made by salesmen of appellants to them, which evidence was introduced to show the course of former dealing between the parties.

These sales, while not in all their particular terms identical with the sale in question, were of the same general character and certainly the evidence was admissible to show the course of dealing between the parties, and that from this appellees had a right to assume that Benedict had authority to bind appellants by a sale and that his authority was not limited, as contended by appellants, to taking orders subject to their approval.

We find no error in the record, and the judgment is affirmed.

Affirmed.

H. W. LONG v. E. A. PATTON ET AL.

Decided April 20, 1906.

1.—Endorser—Extension of Time—Release.

At the request of the holder of a note, an endorser thereof agreed that the time of payment might be extended in consideration, and upon the undertaking of said holder returning to the possession of the maker certain property mortgaged to secure the payment of said note. The note was extended, but the property was never returned, as stipulated by the endorser. Held, the endorser was thereby released.

2.—Endorser—Release.

The release of the maker of a note releases the endorser also.

3.—Assumption of Note—Principal and Surety.

When the purchaser of mortgaged property, as a part of the consideration therefor, assumes the payment of the mortgage note, he becomes primarily liable therefor, and the maker of the note occupies the position of a surety.

4.—Same—Extension of Time—Release of Maker.

If the holder of the note extends the time of payment at the request of the party who has assumed its payment, the maker is thereby released.

Error from the District Court of Harris County. Tried below before Hon. Norman G. Kittrell.

Stanley Thompson, for plaintiff in error.—If the agreement made by Long was, as claimed by Smothers, that Long would get possession of the cattle in question from Cowan, and deliver them over to Patton, then it was a mere promise to do something in the future, and is no legal grounds for the rescission of the agreement made by Smothers to extend the notes. Chicago, T. & M. C. Ry. v. Titterington, 84 Texas, 218; Mayer v. Swift, 73 Texas, 367.

There being no evidence to justify it, and no finding of the court that Smothers was damaged by the failure of Long to carry out the alleged agreement to get the cattle back from Cowan and put them back into the possession of Patton, the failure of Long to carry out such agreement can not be made the basis of a claim to rescind the agreement of Smothers to the extension of the time for payment of the notes. Bremond v. McLean, 45 Texas, 17; Lemmon v. Hanley, 28 Texas, 220.

Long's taking the mortgage of October 27 and releasing the same, if he did release it, did not release the indorsers, because it left them in no worse condition than they were at the time of their indorsement. Tooke v. Taylor, 31 Texas, 1.

Cobb & Campbell and *A. E. Amerman,* for defendants in error Smothers and Patton.—If, at the time Long made the agreement with Smothers, that he could and would secure the cattle from Cowan and return them into the possession of Patton, he, Long, knew that he could not carry out the said agreement, and had no intention of carrying out the same, at the time he made it, and made the same with the design to deceive Smothers, then this would constitute such a fraud against Smothers as would entitle him to a rescission of the agreement to extend the notes. Chicago, T. & M. C. Ry. v. Titterington, 84 Texas, 218.

The conclusion of law that by the release of Patton, the maker of the note, all endorsers were released is supported by the evidence, because it is shown that Cowan had assumed the payment of the notes, and that Long had released Cowan from liability on the notes, which in effect, released Patton and Smothers. Hall v. Johnston, 24 S. W. Rep., 861; Union Stove & Machine Works v. Caswell (Kan.), 16 Law Rep. Ann., 85; Colgrove v. Tallman, 67 N. Y., 95; Norton on Bills and Notes, secs. 120 and 121.

REESE, ASSOCIATE JUSTICE.—This is a suit instituted by H. W. Long against E. A. Patton, as maker, and the Chas. R. Munger Investment Company and D. D. Smothers, endorsers, on two notes for $206.32 each, and against E. A. Patton, as maker, and Chas. R. Munger Investment Company, as endorsers, on one note for $100, all of which notes were secured by chattel mortgages on cattle which are sought to be foreclosed. T. M. Cowan was also made defendant upon an allegation that he had possession of some of the cattle.

Patton answered by general demurrer and general denial and pleaded specially that after the execution of the notes by him, he, with the knowledge and consent of all parties concerned, sold and delivered to T. M. Cowan the cattle described in the chattel mortgages referred to (excepting two head), and that as one of the considerations of such sale Cowan assumed the payment of the several notes sued on. That plaintiff had knowledge of said sale and agreement and consented and acquiesced therein, and that afterwards, about October 27, 1903, plaintiff, in consideration of the sum of $25 to him paid by Cowan and without the knowledge and consent of, and without any consideration to him, said Patton, agreed to and did extend to Cowan the time for the payment of all of said notes beyond the date of their maturity, by reason whereof he, Patton, was released therefrom. It is further averred that afterwards plaintiff, for a consideration, agreed to and did release and discharge Cowan from the obligation assumed by him to pay said notes.

Defendant Patton further alleged that the cattle covered by the chattel mortgages were, in value, ample security for said notes, and that through the fraud and connivance of plaintiff they were all delivered into the hands of plaintiff and other persons, at the request of plaintiff, some of the cattle having been in the meantime sold by Cowan with the consent of plaintiff, and that thereby the security was dissipated and depreciated. It is alleged that the effect of the acts aforesaid was to release and discharge defendant Patton from liability upon the notes.

Defendant Smothers answered also by general demurrer and general denial and specially pleaded, in substance, that after the transfer and endorsement by him of the two notes referred to in plaintiff's petition, it having come to his knowledge that the cattle described in the mortgages given to secure the same, were, with the consent of plaintiff and C. R. Munger Investment Company, to whom he had endorsed the notes and who had in turn endorsed the same to plaintiff, being rapidly disposed of to other parties in fraud of the rights of defendant, he, when said notes were about due, demanded of plaintiff that he at once enforce collection of the same. That thereupon plaintiff, the Munger Investment Company and E. A. Patton requested and importuned defendant to agree to extend the time of payment for thirty days, which he at first refused to do, but that he did later agree that such extension should be granted upon condition that plaintiff would at once get possession of all of said cattle and deliver the same to said Patton, the reason for such stipulation being that Patton resided near defendant and defendant could have personal supervision of the cattle if in Patton's possession. It is averred that plaintiff, Patton and C. R. Munger falsely represented to defendant at the time, that the cattle could be returned to Patton, by which defendant was misled and induced to agree to the extension of the notes. It is alleged that, in fact, all of said cattle had been disposed of by Patton with the consent of plaintiff and the Munger Investment Company to Cowan, who had bought the same from Patton, and they could not be returned to Patton as agreed, and were not in fact so returned to him, but that on the contrary, the parties conspired together to dispose of the cattle so that they could not be reached for the purpose of realizing the amount of said notes from a sale of them. It is charged that Munger bought some of the cattle and that plaintiff disposed of

others at greatly less than the then market value, the result of which was that the security for the notes was dissipated in the belief, on the part of plaintiff, that he could hold defendant upon his endorsement.

The facts with regard to the sale by Patton to Cowan with plaintiff's consent, the assumption by Cowan of the notes sued on, and the extension of the notes, for $25 cash paid to plaintiff by Cowan, and the subsequent release of Cowan, who is alleged to have been amply able to pay the notes, upon the delivery of the cattle by Cowan to plaintiff, were also pleaded.

The Munger Investment Company by its answer denied generally the allegations of the petition, but admitted the endorsement of the notes to plaintiff, and prayed if payment be recovered against it, that it have judgment over against Patton and Smothers.

Cowan answered that he had none of the cattle as alleged, but that he had turned over to plaintiff all of the cattle secured by him.

Upon trial before the court without a jury judgment was rendered for all of the defendants, and the plaintiff appeals. No brief has been filed for the Munger Investment Company or Cowan.

The court filed conclusions of fact, which are sufficiently supported by the evidence and are here adopted. From such findings the following condensed statement of the facts is made:

The notes were executed by Patton and endorsed by the Munger Investment Company, and by the said company and Smothers, and secured by the chattel mortgages on cattle, substantially as alleged in plaintiff's petition.

On October 23, 1903, one of the notes for $206.32 being due, and the other about to become due, plaintiffs Long, Smothers and C. R. Munger made some kind of an agreement by endorsing upon the back of each of said notes the following statement: "October 23, 1903. I hereby agree to the extension of the within note for 30 days from date hereof," signed by D. D. Smothers and Chas. R. Munger. The notes not being paid at the end of the thirty days this suit was brought.

At the time the agreement was made for the extension of the notes, the cattle had been sold by E. A. Patton, the maker of the notes, to T. M. Cowan, who as part of the consideration therefor assumed the payment of all of said notes.

On the 23d of October, when Smothers and C. R. Munger (who was in fact the Munger Investment Company) signed the agreement for the extension of the notes, the cattle were amply sufficient, in value, to pay the notes, and Smothers informed Long of this fact, and told him that he would not stand for the debt any longer unless the cattle were put back in Patton's possession so that they would be where Smothers could look after them, and Smothers refused to agree to the extension of the notes, as endorser thereof, unless this was done. Long agreed to do this. But for this agreement Smothers would not have agreed to the extension. This was never done, nor did Long ever take possession of the cattle.

On October 27, 1903, in consideration of $25 paid him by Cowan, Long extended the payment of the notes until November 22, 1903. This extension was granted to Cowan, who had assumed the payment of the notes when he bought the cattle from Patton. Cowan gave a mort-

gage on the cattle to secure the payment of his note for $25 paid to Long, and in this mortgage it is stated that it is also given as additional security for the three notes sued on, the payment of which had been assumed by him.

With regard to the release by Long of Patton, the findings of fact of the trial court are very obscure and confusing. Looking, however, to the conclusion of law, in which are mingled what are properly conclusions of fact, we find the following facts, which are supported by the evidence, that is to say, Long accepted the condition arising out of the fact that Cowan had assumed to Patton the payment of the notes, and, after having first agreed with Cowan to extend the time of the payment of the notes; after having obtained the consent of Smothers and Munger under the circumstances as before recited; after the notes became due upon the expiration of the extension, took possession of some of the cattle and sold them and released Cowan from all liability upon the notes.

The first, second and third assignments of error attack certain findings of fact by the trial court, as not being supported by the evidence. The findings so complained of are, we think, fairly deducible from the evidence, taken as a whole. The testimony in support of the finding that Long had released Cowan is very meagre and not at all satisfactory to our minds, but we can not say that it is without evidence to support it, which is the only ground upon which it is attacked.

The fourth assignment refers to what is called a finding of fact of the trial court which, in fact, is not such a finding at all, but merely a discussion of the evidence in no way material to the decision of the case.

Other assignments of error are addressed to the conclusions of law of the trial court and may be disposed of without further reference to each assignment separately.

Whether the extension of the two notes upon which Smothers was endorser had been given to Patton, the maker, or to Cowan, who had assumed payment thereof, the agreement of Smothers to such extension was expressly conditioned that the cattle should be placed back in the possession of Patton. Smothers did not extend the time of payment of the notes. It was not in his power to do so. The legal effect and the clear intention of the agreement endorsed on the notes and signed by himself and Munger, coupled with the condition upon which it was made, was that he thereby agreed that Long, the holder of the notes, might grant such extension, provided the cattle were disposed of as required by him, which Long agreed should be done. Any extension granted to Cowan without a compliance with this condition was without the consent of Smothers and released him from liability. If the promise or agreement of Long, with regard to the cattle, be taken as the sole consideration for Smothers' agreement to an extension of the notes, the failure of Long to carry out this agreement would amount to a failure of consideration for Smothers' agreement.

This is not a suit by Smothers to rescind the agreement, but, in legal effect, a suit by Long to enforce it, and the distinction between a false promise and a false representation of an existing fact does not apply as in the cases of Chicago, T. & M. C. Ry. v. Titterington, 84 Texas, 218, and Mayer v. Swift, 73 Texas, 367, cited by appellant.

Independent of this, however, the release of Patton, the maker of the note, also operated a release of Smothers as endorser.

The trial court found, which finding we have approved, that Patton had sold the cattle to Cowan and that as one of the considerations of such sale Cowan assumed the payment of all of the notes here sued upon, which were secured by mortgages on the cattle. This made Cowan primarily liable for the payment of the notes and established the relation of principal and surety as between himself and Patton, the maker.

The trial court also found, which finding we have approved, that Long had released Cowan from this liability. The evidence tends to show that Long accepted or acquiesced in this new relationship of principal and surety between Cowan and Patton growing out of the assumption of the notes by Cowan, as is shown by his demanding and accepting from Cowan $25, and in consideration thereof granting to Cowan an extension of the time of payment of the notes. Long seems to have really dealt with Cowan and not Patton as the person primarily liable on the notes, and to have understood that the extension, to which it is claimed Smothers and Munger agreed, was to Cowan and not to Patton.

There seems to be some conflict in the authorities as to whether an extension of the time of payment to a person who, by agreement with the maker of a debt, for sufficient consideration, has assumed the payment thereof, will release such original debtor. The question was decided in the affirmative by the Court of Civil Appeals of the Third District in Hall v. Johnston, 24 S. W. Rep., 861, Chief Justice Fisher dissenting. It was held by this court in Zapalac v. Zapp, 54 S. W. Rep., 938, that where the holder of a note, after having received information that one of the apparent joint makers of the note was, in fact, only a surety, extends the time of payment thereof without the consent of such surety, the surety is thereby released, though the holder did not know that the surety was not a joint maker at the time he took the note. It would logically follow from this that the holder of a debt is bound to recognize the relationship of principal and surety, *inter sese*, of persons bound for the debt, if he knows of such relationship at the time the extension of time of the payment of the debt is granted or such principal released.

In the present case Long not only knew of the primary obligation of Cowan to pay the debt, making him the principal not only as to the maker but also as to the endorsers, but undertook to deal with him as such. Cowan's liability to him at all rested solely upon his assumption of the debt by agreement with Patton, and the effect of this was to make him the principal debtor. We think that by the release of Cowan he hereby released Patton, the maker of the notes, from liability. In addition to authorities cited in the majority opinion in Hall v. Johnston, *supra*, we refer to 22 Am. and Eng. Ency. of Law (2d. ed), p. 433, and authorities collected in note; also Union Stove & Machine Works v. Caswell, 16 Law Rep. Ann., 85.

It also appears that the extension of time granted to Cowan by Long was without the knowledge or consent of Patton, which furnishes an additional ground for the release of Patton.

We have concluded in a former part of this opinion that the extension of time granted to Cowan released the endorsers. The release of Cowan

also had this effect, and if there should be any doubt upon this point, the release of Patton, the maker of the notes, either upon the ground of the extension of time, or the release of Cowan, operated of itself to release Smothers and Munger.

Munger (or the Munger Investment Company) did not seek by his pleadings to avail himself of this release and discharge, but there is no assignment of error upon this point and in the absence of such assignment the point can not be considered.

This disposes of all the questions raised by the assignments of error. We find no error in the judgment and it is therefore affirmed.

Affirmed.

W. P. BLAKE v. M. W. LOWRY.

Decided April 21, 1906.

1.—Conditional Sale.

When property is conveyed by one person to another under an agreement for a reconveyance upon the payment of a specified sum at some future time, such conveyance will be held as a conditional sale, provided it clearly appears that the right to repurchase is optional with the vendor, and the relation of debtor and creditor does not exist between the parties as to the agreed consideration for such reconveyance. If the consideration for the conveyance is a pre-existing debt it must clearly appear that the debt is extinguished, otherwise the conveyance will be held a mortgage and not a conditional sale.

2.—Written Instrument—Parol Evidence to Vary.

Defendant, at the time the conveyance was executed to him for the land in controversy, gave to plaintiff the following writing: "This is to certify that James Roland this day conveyed to me a tract of one acre of land, and when W. P. Blake pays me $28.20 and interest, and costs of new transfer, I agree to reconvey said acre of land to W. P. Blake on demand." Held, in the absence of mistake or fraud, parol evidence was not admissible to show that defendant held said land as security for other indebtedness due him by plaintiff than that named in said writing.

3.—Homestead—Mortgage of.

One who had been divorced from his wife may mortgage the homestead.

Appeal from the District Court of Jefferson County. Tried below before Hon. A. T. Watts.

F. J. & R. C. Duff and *A. L. Davis,* for appellant.—When parties have reduced the contract or agreement between them to writing, and the writing on its face appears to be complete, evidence of contemporaneous parol agreements will not be heard to add to, take from or vary the writing, and the fact that the written agreement is in the form of a receipt does not affect the rule if it also embraces by its terms a contract. Lanes v. Squyres, 45 Texas, 382-7; Building & Loan Assn. v. Hamm, 36 S. W. Rep., 313; Self v. King, 28 Texas, 552; Belcher v. Mulhall, 5[illegible] Texas, 17-19; Willis v. Byars, 21 S. W. Rep., 320.

A mortgage on land can not be created by parol, nor can an existing mortgage be extended to secure debts which it was not originally made to secure. Castro v. Illies, 13 Texas, 233; Wynne v. Flannegan, 25

Texas, 778; Boehl v. Wadgymar, 54 Texas, 589; Johnson v. Portwood, 89 Texas, 248; Williams v. Hills, 19 How., 60 U. S., 570; Curles Heirs v. Eddy, 24 Mo., 117; Irwin v. Hubbard (Ind.), 19 Am. Rep., 682; Brown on Statute of Frauds, sec. 267.

Whether a transaction is a conditional sale or a mortgage, is a question of law to be determined from the real nature of the transaction, and is not affected by what the parties may choose to call it, and in doubtful cases the transaction will be construed as a mortgage rather than as a conditional sale. Ruffier v. Womack, 30 Texas, 332-340; Alstin v. Cundiff, 52 Texas, 453-462; DeBruhl v. Mass, 54 Texas, 464-472; Calhoun v. Lumkin, 60 Texas, 185-188; McCamant v. Roberts, 80 Texas, 316-322; Hart v. Eppstein, 71 Texas, 752-756; 6 Am. and Eng. Ency. of Law, 443.

The defendant having acquired a certain tract of land and holding same under a written contract between himself and plaintiff, and said tract having been exchanged by consent of both plaintiff and defendant for the land in controversy, defendant holds the land in controversy under the terms of the contract under which he held the original tract. Sayles' Civ. Stats., art. 2543, subdiv. 4.

Defendant having failed to establish title to the property sequestered, was liable for all actual damages sustained by plaintiff by reason of the sequestration, and if defendant knew at the time of suing out the writ that he had no title, he was also liable for exemplary damages. Simpson v. Lee, 34 S. W. Rep., 1053.

Plaintiff having clearly proven that when the writ of sequestration was issued, defendant had not title to the land in controversy, and having introduced sufficient evidence and proven his damages, he was entitled to judgment therefor. Wilkinson v. Stanley, 43 S. W. Rep., 609; Simpson v. Lee, 34 S. W. Rep., 1053.

No briefs for appellee.

PLEASANTS, ASSOCIATE JUSTICE.—This is an action of trespass to try title and for the recovery of actual and exemplary damages for the alleged wrongful suing out and levy of a writ of sequestration, brought by appellant against the appellee.

The property involved in the suit is a part of a ten acre tract out of the Absalom Williams survey in Jefferson County, and is described in the petition as a lot or parcel of land 124 x 700 feet off the west end of said ten acre tract and a roadway 14 feet wide along the east side of said lot.

In addition to the usual allegations of a petition in trespass to try title plaintiff alleged, in substance, that prior to the 14th day of May he purchased by verbal sale from James Roland a tract of one acre of land out of said ten acre tract for a consideration of $110, and that immediately after his purchase he went into possession of said land and made permanent and valuable improvements thereon; that on the date last named he owed Roland a balance of $28.20 of the purchase money for said land, and not having the money to pay same he borrowed that amount from the defendant and agreed that Roland should convey the land to defendant and that he should hold same until plaintiff could

repay him the amount so borrowed; that in pursuance of this agreement the land was conveyed by Roland to defendant and the latter executed and delivered to plaintiff the following instrument evidencing the terms of the agreement between them:

"This is to certify that James Roland this day conveyed to me a tract of one acre of land, and when W. P. Blake pays me $28.20 and interest and costs of new transfer, I agree to reconvey said acre of land to W. P. Blake on demand."

That thereafter, in June, 1901, plaintiff paid the sum borrowed, together with defendant's fee for preparing the deed from Roland, and obtained from defendant the following receipt:

"Beaumont, Texas, June —, 1901.

"Received of W. P. Blake, thirty and fifty one hundredths dollars ($30.50); $28.20 for money loaned on deed; $2.50 for drawing deed to Clarkson.

M. W. Lowry."

That on two occasions prior to March 3, 1903, plaintiff sold portions of said one acre tract, and in each of said sales plaintiff and his vendee employed defendant to prepare the deed of conveyance and paid his charges therefor; that on March 3, 1903, plaintiff agreed with W. B. Lewis to trade him the balance of said one acre tract for the land in controversy in this suit, and he and said Lewis employed defendant to prepare the necessary conveyances between them; that in accordance with this agreement defendant on said date conveyed to Lewis the remainder of said one acre tract and took a deed to himself from Lewis to the land in controversy; that immediately after the exchange of said deeds plaintiff took possession of the property in controversy and he and his wife continued to occupy it as their homestead until dispossessed under a writ of sequestration sued out by defendant; that plaintiff was not present when said deeds of exchange were executed and delivered and supposed that the deed from Lewis had been made to him and did not learn otherwise until shortly before the filing of this suit; the plaintiff had often requested defendant to reconvey his land to him prior to the time that the exchange was made with Lewis, "but defendant would always interpose some excuse telling him that he would attend to it soon, but did not do so; that after said exchange of land and shortly prior to the filing of this action, after the information had come to him that something was wrong with his title, plaintiff renewed his said demand and defendant put him off as before, but defendant never in any manner, nor at any time whatever claimed title to said land, or to have any lien upon it until after this action was filed, disclosing the fact for the first time in his answer herein; that plaintiff is a colored man and uneducated, being scarcely able to read and write, and during all the said time and almost up to the time of filing this action defendant was plaintiff's attorney and counsel and occupied a position of trust toward plaintiff; and that plaintiff in all of his business transactions relied upon the advice and counsel of defendant as his attorney, and that in all the transactions herein set out plaintiff acted on the advice and counsel of said defendant and placed the fullest confidence and trust in him as his attorney."

These allegations are followed by a cross bill alleging the wrongful and malicious suing out and levy by defendant of a writ of sequestration under which plaintiff was dispossessed of said property. The prayer of the petition is for recovery of the title and possession of the property, the removal of the cloud upon plaintiff's title cast by defendant's claim, and for actual and exemplary damages caused by the sequestration proceedings.

The defendant answered by general demurrer and plea of not guilty and by special pleas in which it is averred, in substance, that at the time the one acre tract of land purchased by plaintiff from James Roland was conveyed to defendant plaintiff was indebted to him for legal services in the sum of $50, and it was agreed by the plaintiff that the deed to said land from Roland should be made to defendant and it should remain the property of defendant to secure the payment of said $50, the $28.20 paid by defendant to Roland, and such other sums of money as defendant should advance to plaintiff from time to time, defendant agreeing to reconvey the land to plaintiff upon his payment of the indebtedness aforesaid; that in pursuance of said agreement defendant advanced to plaintiff at different times various sums of money aggregating the sum of $811.70, as shown upon an exhibit attached to defendant's answer. This exhibit shows that the account has been credited with various amounts paid by plaintiff in cash and in labor, the balance claimed to be due by defendant being $464.10. The answer further avers:

"That on the third day of March, 1903, with the consent and agreement of plaintiff, defendant exchanged or traded said tract of land for the tract of land sued for herein, and it was understood and agreed between plaintiff and defendant that said tract of land should be deeded to defendant and should be the property of defendant and remain his property to secure each of said amounts contained and shown by exhibit "A" hereto attached, until such time as plaintiff might purchase said land from defendant by paying to defendant all of said sums and advances in full.

"Defendant shows that after he obtained title to the land in controversy he permitted plaintiff to enter on and occupy said land as his tenant, and that many of the items as shown by exhibit 'A' hereto attached, consisted of material which defendant furnished to plaintiff and plaintiff used in constructing a house and other improvements on said property, and that plaintiff continued to occupy said land as defendant's tenant at will up to the time plaintiff instituted this suit.

"Therefore defendant shows that he is the legal and equitable owner of said land, and that plaintiff has no right in said property except to purchase same from defendant by paying to defendant in full all of aforesaid sums of money and advances that plaintiff has obtained from defendant. But should defendant be mistaken in this, and it should be decided by the court that said transaction constitutes a lien on said property of said sums of money so advanced by defendant to plaintiff, then defendant prays that he have judgment against plaintiff in the sum of $464.10 and interest, and that said lien on said land be foreclosed and that said land be sold and that the proceeeds of said sale be applied to the payment of said judgment, and for such other and further relief

in law or equity as under the facts he may be entitled and in duty bound will ever pray."

The trial in the court below was to the court and resulted in a judgment in favor of the defendant, that plaintiff take nothing and that defendant recover all costs of the suit.

The evidence shows that the defendant Lowry advanced the $28.20 due by plaintiff Blake to Roland as a part of the purchase money for the one acre tract of land and by agreement with Blake took the deed therefor in his own name to secure said sum and a further indebtedness of $43 due him by Blake. At the time this deed was executed defendant executed and delivered to Blake the written agreement set out in plaintiff's petition. Thereafter Blake paid the $28.20 and fee charged him by defendant for preparing the deed, and defendant executed and delivered to him the receipt of June —, 1901, set out in the petition. The defendant testified as follows:

"Blake agreed with me at the time the deed was made to me by Roland that the land should be held by me and to be sold to him for all that he owed me besides the $28.20 purchase money as well as for that amount, and later that it should also be held by me for the other amounts that I advanced him.

"While I held the title to this original tract of land Blake sold two small parcels of it to different people and I made the deeds for him.

"On March 3, 1903, Blake owed me four hundred and sixty-seven dollars, and he had been negotiating with W. B. Lewis an exchange of the land deeded to me by Roland for a tract then owned by Lewis. He consulted me about the trade, and I advised him to make it and consented for him to do so. He did make the trade with Lewis for the land now in controversy, and before doing so he agreed with me that the conveyance should be made by Lewis to me and that I should hold this land upon the same terms as I held the original tract and should sell to him at any time he would pay the amount then due, $467. Lewis came to my office and I executed a deed conveying the Roland tract of land to him, and he conveyed to me the tract of land now in controversy. Blake was not present when this was done."

The evidence supports the finding that the plaintiff is indebted to the defendant in the sum of $467 for advances of money and supplies made to him by defendant subsequent to the date of the deed from Roland. The defendant further testified that he regarded the land as his until plaintiff paid him all of said indebtedness. Plaintiff was occupying the one acre tract purchased from Roland as his homestead at the time the deed from Roland to defendant was executed, and continued to occupy it as such until he exchanged it with Lewis for the land in controversy. Shortly before he traded with Lewis he was divorced from his wife, and at the time he made that trade and the deed from Lewis to defendant was executed, he was unmarried. A few days after this trade was made he remarried and moved upon the land in controversy, and continued to occupy it as his homestead until dispossessed under the writ of sequestration issued in this suit.

When plaintiff demanded a deed from the defendant shortly before this suit was filed defendant offered him a deed reserving a vendor's lien

to secure notes to be executed by plaintiff for the amount of the indebtedness claimed to be due by him to defendant.

The account evidencing the indebtedness of plaintiff to the defendant shows that a considerable portion of said indebtedness was incurred subsequent to the conveyance of the land to defendant by Lewis, and there is no evidence that either the plaintiff or defendant regarded the indebtedness as discharged by the execution of said deed.

The trial court held that this evidence established a conditional sale of the land by plaintiff to defendant, and plaintiff having failed to perform the condition under which he could secure a reinvestment of the title by paying or offering to pay the amount agreed upon, the defendant was entitled to a judgment.

We can not agree with the learned trial judge in this conclusion. When property is conveyed by one person to another under an agreement for a reconveyance upon the payment of a specified sum at some future time, such conveyance will be held as a conditional sale provided it clearly appears that the right to repurchase is optional with the vendor and the relation of debtor and creditor does not exist between the parties as to the agreed consideration for such reconveyance. If the consideration for the conveyance is a pre-existing debt it must clearly appear that the debt is extinguished, otherwise the conveyance will be held a mortgage and not a conditional sale. (Ruffier v. Womack, 30 Texas, 332; Alstin's Executor v. Cundiff, 52 Texas, 453; DeBruhl v. Mass, 54 Texas, 464.)

Applying this test to the evidence in this case, it is clear that the conveyance by Lewis to appellee, if made as claimed by appellee with the consent of appellant and under an agreement by which appellee should hold the land as security for the debt due him by appellant, is in effect a mortgage, and can not be regarded as a conditional sale. It is true appellee testified that he regarded the land as his after such conveyance subject only to the right of appellant to obtain a reconveyance upon the payment of his indebtedness, but the evidence not only fails to show that the debt was extinguished by the conveyance, but on the contrary, it is shown that additional amounts were advanced appellant for which the land was held as security, and no part of the open and running account between the parties, which was the consideration for the conveyance, was extinguished. Under the evidence adduced on the trial appellee could at any time after the land was conveyed to him have sued and recovered against appellant the amount due upon said account and have foreclosed his mortgage on the land to secure same. The transaction can not be both a mortgage and a conditional sale, nor can it be optional with the creditor as to whether he shall treat it as the one or the other. If his debt is not extinguished and his right to enforce it gone, the conveyance to him can only be regarded as a mortgage, and he can only subject the property to the payment of his debt by proper foreclosure proceedings.

It follows from what we have said above that the judgment of the trial court must be reversed and the cause remanded for a new trial, and it is therefore necessary to pass upon appellant's assignment attacking the ruling of the court in permitting appellee to show by parol that he held the land conveyed to him by James Roland as security for other

indebtedness due him by appellant than that stated in the written instrument executed by him at the time he received such conveyance.

We think the objection to this evidence should have been sustained. There is no ambiguity in the written instrument and it purports to express the whole agreement between the parties and it can not be added to or varied by parol in the absence of mistake or fraud.

It further appears from the evidence that at the time the conveyance from Roland to appellee was executed the property was the homestead of appellant, and therefore any agreement on appellant's part that appellee should take the deed thereto from Roland and hold the property as security for any of the indebtedness claimed by appellee except the purchase money paid by him to Roland, was void.

When this property was traded by appellant to Lewis he was divorced from his wife and apparently had the right to mortgage the property acquired by him from Lewis. If upon another trial it should be shown that appellant did, as claimed by appellee, agree that the deed from Lewis should be made to appellee and that he should hold the property as security for the indebtedness due him by appellant, this would constitute a mortgage, and appellee would have the right to a foreclosure, appellant being entitled to offset against his indebtedness to appellee the damages, if any, which he may recover on his plea in reconvention.

For the reasons before indicated, the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

LUCY BROWN ET AL. v. LUCIUS HUMPHREY ET AL.

Decided April 21, 1906.

1.—Suit Involving Homestead—Wife not Necessary Party, When.

A judgment against the husband binds the interest of the wife in community real estate, unless she has a defense growing out of her homestead rights. Unless the fact that the land was a homestead is available as a defense the wife is not a necessary party to the suit.

2.—Community Property—Homestead—Partition Deed—Consent of Wife.

A parol partition of community land by the husband, fairly made, with the consent or acquiescence of the wife, will be binding on the wife notwithstanding its homestead character. For the purpose of effecting a partition of community land occupied as a homestead the husband executed a deed to the cotenant; the name of the wife did not appear in the body of the deed, but she signed and acknowledged it. Held that, although the deed was not operative as a conveyance by the wife, it was evidence of her consent to the partition.

3.—Costs—Article 1438, Rev. Stats., Construed.

Plaintiffs sued for an entire tract of 300 acres; defendants answered by plea of not guilty and limitation; plaintiffs had judgment for 150 acres, and defendants for 150 acres; the court adjudged the costs against the plaintiffs, giving as a reason for so doing that the only issue in the case was the title to the 150 acres claimed and recovered by defendants. Held, error. The defendants might have filed a disclaimer as to the land they did not claim and so protected themselves against costs, but, having put in issue plaintiffs' title to the entire tract, they should pay the costs.

Appeal from the District Court of Fort Bend County. Tried below before Hon. James Slyfield, Special Judge.

J. C. Mitchell and *T. E. Mitchell*, for appellants.—The court erred in holding that the judgment rendered in the District Court of Fort Bend County, Texas, on the 25th day of March, A. D. 1898, whereby Virginia Palmer and Irene Palmer recovered judgment against appellants Archie Brown and Thomas Roberts for an undivided one half interest in the three hundred acres of land in controversy in this suit, was binding on both appellants Lucy Brown and husband, Archie Brown, as well as on Fanny Roberts and husband, Thomas Roberts, when said land at said time constituted their respective homesteads. Willis v. Matthews, 46 Texas, 478; Whetstone v. Coffee, 48 Texas, 269; Wheatly v. Griffin, 60 Texas, 209; Coker v. Roberts, 71 Texas, 597; Myers v. Evans, 81 Texas, 317; Dykes v. O'Conner, 83 Texas, 160; Freeman v. Hamblin, 1 Texas Civ. App., 157; Texas Land and Mortgage Co. v. Cooper, 67 S. W. Rep., 175; Waples on Homestead Exemption, pp. 121, 122 and 384.

A judgment rendered against the husband alone for land which constitutes the homestead of the husband and wife is void, and inoperative as to both husband and wife, although such land may be separate property of the husband or the cummunity property of both hubsand and wife. Thompson v. Jones, 60 Texas, 94; Mexia v. Lewis, 21 S. W. Rep., 1016; Freeman v. Hamblin, 21 S. W. Rep., 1019; Odum v. Menafee, 33 S. W. Rep., 130; Gober v. Smith, 36 S. W. Rep., 910; San Antonio Real Estate Assn. v. Stewart, 65 S. W. Rep., 665; Waples on Homestead and Exemption, pp. 684, 5 and 6; 9 Am. and Eng. Ency. of Law, p. 431.

The court erred in holding that the deed of date November 28, 1898, whereby Archie Brown and Thomas Roberts convey to C. R. Wharton, Robert Woody, Wm. Sorley, M. L. Morris and M. M. Crow, the north half of the three hundred acres of land in controversy in this suit was binding on both Archie Brown and wife, Lucy Brown, and Thomas Roberts and wife, Fanny Roberts, when the west half of the land so conveyed constituted part of the homestead of said Archie Brown and wife, Lucy Brown, and the east half of the land so conveyed constituted part of the homestead of Thomas Roberts and wife, Fanny Roberts, at said date. Constitution of the State of Texas, 1876, art. 16, sec. 50; Rev. Stats. of Texas, 1879, arts. 559 and 560; Fitzgerald v. Turner, 43 Texas, 79; Whetstone v. Coffee, 48 Texas, 269; Campbell v. Elliott, 52 Texas, 151; Wheatley v. Griffin, 60 Texas, 209; Morris v. Geisecke, 60 Texas, 633; Cole v. Bammel, 62 Texas, 108; Warren v. Jones, 69 Texas, 462; Coker v. Roberts, 71 Texas, 597; Murrell v. Wright, 78 Texas, 519; Madden v. Madden, 79 Texas, 595; Stone v. Sledge, 87 Texas, 53; Astugueville v. Loustaunau, 61 Texas, 233; Kalamazoo Nat. Bank v. Johnson, 24 S. W. Rep., 350; Roberts v. Ezell, 32 S. W. Rep., 362; Huss v. Wells, 44 S. W. Rep., 33; Bishop on Married Women, vol. 1, sec. 594; Tiedeman on Real Prop., sec. 794; Devlin on Deeds, vol. 1, secs. 101, 107 and 196; 5 Am. and Eng. Ency. of Law, 428; 9 Am. and Eng. Ency. of Law, 477; Parson on Contracts, vol. 1, p. 406; First Hilliard on Real Prop., p. 89.

In a suit of trespass to try title wherein the defendant does not dis-

claim, but pleads not guilty, and the statutes of limitation, then upon a recovery by plaintiff for part of the land sued for, entitles the plaintiff to a further judgment against the defendant for all costs of court. Rev. Stats. of 1879, arts. 4806, 4791-4794; Koenigheim v. Miles, 67 Texas, 113; Wooters v. Hall, 67 Texas, 513; King v. Haley, executrix, 75 Texas, 163; Ballard v. Carmicheal, 83 Texas, 355; Houston & T. C. Ry. Co. v. Bowie, 2 Texas Civ. App., 437; Bexar County v. Voght, 91 Texas, 285; Rains v. Wheeler, Executor, 76 Texas, 390; Dutton v. Thompson, 85 Texas, 115; Keyser v. Meusback, 77 Texas, 64; Moody v. Holcomb, 26 Texas, 714; Titus v. Johnson, 50 Texas, 224; Meyers v. Kirlicks, 25 S. W. Rep., 652.

Spencer C. Russell, for appellees.—The wife is neither a necessary or proper party to a suit involving the title to a community homestead, unless her homestead rights would be a defense to the action. Plaintiffs neither plead nor proved that the homestead rights of Lucy Brown would have been a defense to the suit of Palmer v. Brown et al., and hence they are bound by the judgment therein. Jergens v. Schiele, 61 Texas, 257; San Antonio v. Berry, 92 Texas, 327; Butler v. Carter, 58 S. W. Rep., 634; Collins v. Ferguson, 56 S. W. Rep., 225; Central Coal Co. v. Henry, 47 S. W. Rep., 281; Cage v. Perry, 38 S. W. Rep., 543.

In the absence of fraud upon the wife, the husband may designate the homestead. Therefore, Wharton having title to an undivided one-half of the 300 acres, the deed of partition executed by Brown and Roberts to Wharton, for the specific one-half, was in effect a designation by them of the other one-half as their respective homesteads, and said deed is binding upon their wives, and especially is this true since both Lucy Brown and Fannie Roberts signed and acknowledged the deed of partition. Wardlow v. Miller, 69 Texas, 399; Halbert v. Carroll, 25 S. W. Rep., 1104; Martin v. Harris, 26 S. W. Rep., 92; Arnold v. Attaway, 35 S. W. Rep., 483; Aycock v. Kimbrough, 10 Am. St. Rep., 745, note.

The court properly taxed the costs against the appellants.

REESE, ASSOCIATE JUSTICE.—This is a suit in trespass to try title by Lucy Brown and her husband, Archie Brown, and Fannie Roberts and her husband, Thomas Roberts, against Lucius Humphrey and his wife, Cordia Humphrey, to recover the title and possession of 300 acres of land. It was alleged that one-half of the land belonged to Fannie and Thomas Roberts and had been their homestead since January 1, 1898, and the other half belonged to Lucy and Archie Brown and had been their homestead since January 1, 1898, said tracts having been continuously used by the parties respectively as a homestead.

Defendants answered by general demurrer, general denial and plea of not guilty, and pleaded the statute of limitations of five years in bar of plaintiffs' right to recover. They also pleaded specially that they were tenants of C. R. Wharton, who was the owner of the land claimed by plaintiff by purchase from Virginia Tatum, T. W. Tatum and Irene Palmer, who had recovered the land of plaintiffs Thomas Roberts and Archie Brown by judgment of the District Court of Fort Bend County.

The case was tried without a jury, and judgment rendered for the

plaintiffs for a specific half of the 300 acres and for defendants for the balance. The court adjudged all of the costs against plaintiffs. From this judgment plaintiffs appeal.

The findings of fact of the trial court are not attacked in any way, and from these it appears that some time prior to 1890 W. R. Goss and others conveyed to plaintiff Archie Brown 150 acres of the tract in controversy, and Lena Blakely conveyed to plaintiff Thomas Roberts the other 150 acres of the tract. At the time of such conveyance the parties, Roberts and Brown, were married to their wives named as plaintiffs. The property was community, and both parties with their wives moved upon their respective tracts and occupied the same as their homesteads and were so occupying them at the time of the filing of the suit and the rendition of the judgment in the cause No. 4051, hereafter referred to. In 1895 Virginia Palmer and others, claiming to own an undivided one-half of the 300 acres aforesaid, brought suit in trespass to try title in the District Court of Fort Bend County in cause No. 4051 against Thomas Roberts and Archie Brown to recover the same, and in 1898 recovered judgment against said defendants Brown and Roberts for the undivided one-half interest in the tract. The wives of said Roberts and Brown, plaintiffs in this suit, were not parties to said suit No. 4051. Their claim to the land sued for therein arose solely from the fact that it was their homestead. They make no claim of title in themselves otherwise.

The title of the plaintiffs in said cause No. 4051 to the said undivided half of the 300 acres became vested by proper conveyances in C. R. Wharton, under whom the defendants in this suit claim as tenants. In 1898, after the rendition of said judgment in cause No. 4051, Archie Brown and Thomas Roberts, for the purpose of partitioning the said 300 acres between themselves and C. R. Wharton, conveyed to said Wharton a specific one-half of the tract, being the land awarded to defendants by the judgment in this cause, and which tract was composed of one-half of the land conveyed to Roberts and one-half of the land conveyed to Brown by the respective deeds to them before referred to. The wives of the said Roberts and Brown signed and duly acknowledged this deed, but their names do not appear in the body of the deed. They were occupying their respective tracts as a homestead at the time of the execution of this deed, and after its execution they remained in possession and occupancy of the remaining portions left to them after the execution of the deed to Wharton, while Wharton has been in possession, use and occupation of the land conveyed to him aforesaid by the deed of Roberts and Brown.

The assignments of error present two propositions of law:

First. It is contended by appellants that the judgment in cause No. 4051, by which Virginia Palmer and others recovered judgment against Thomas Roberts and Archie Brown for an undivided one-half of the 300 acres, is void as to appellants Lucy Brown and Fannie Roberts, their wives, who were not parties to that suit, the respective tracts being their homesteads.

Second. That the property being the homesteads of the parties, the deed of the husbands to C. R. Wharton executed for the purpose of effecting a partition of the 300 acres, is not binding on the wives, appel-

lants herein, for the reason that, notwithstanding they signed and duly acknowledged the same, their names do not appear as grantors in the body of the deed.

As to the first contention, it appears from the findings of fact aforesaid, that Lucy Brown and Fannie Roberts, wives of Archie Brown and Thomas Roberts respectively, at the time of the institution of the suit in cause No. 4051 and of the rendition of judgment therein, had no title to the land involved except such as arose from the fact that it was community property of themselves and their respective husbands and constituted their homesteads.

A judgment against the husband binds the interest of the wife in community property unless she has a defense growing out of her homestead rights. Unless the fact that the land was a homestead was available as a defense, the wife was not a necessary party to the suit referred to. (Jergens v. Schiele, 61 Texas, 258; San Antonio v. Berry, 92 Texas, 327; Central Coal & Coke Co. v. Henry, 47 S. W. Rep., 281.) Where, as in this case, the wife seeks to avoid a judgment against her husband in a suit involving the title to community real estate to which she was not a party, on the ground that the property constituted her homestead, it is incumbent upon her to show that this fact would have availed as a defense. The contrary appears from the record in this case.

The second point urged by appellants; that the names of the wives of Roberts and Brown did not appear in the body of the partition deed, although they signed and duly acknowledged the same; is without merit. A parol partition of land by the husband fairly made, with the consent or acquiescence of the wife, the property being community, and notwithstanding its homestead character, would be binding upon the wife. The evidence shows that this partition was accepted by the parties and there is no intimation that any objection was made by the wives of Roberts and Brown. The fact that they signed and acknowledged the conveyance to Wharton whereby the partition was effected, sufficiently shows that the partition was made with their consent, and that they acquiesced therein. The deed is not operative as a conveyance by them for the reason that their names do not appear in the body of the deed as grantors, but certainly it is as effectual, with their signatures, as a verbal partition made by their husbands with their consent would have been. (Wardlow v. Miller, 69 Texas, 398, 399; Ikard v. Thompson, 81 Texas, 290; Arnold v. Attaway, 35 S. W. Rep., 482.)

Appellants sued for the entire tract of 300 acres, and appellees entered a plea of general denial and not guilty, and pleaded specially that their landlord, C. R. Wharton, had title to the land sued for under the judgment in cause No. 4051, and further pleaded specially the statute of limitations of five years as a bar to appellants' entire claim. Appellants had judgment for that portion of the tract left to them after the execution of the partition deed and appellees recovered the remainder, that is, that portion conveyed by the partition deed. The trial court adjudged the entire costs against appellants. The reasons set out in the judgment for this action as to the costs are as follows: "The only issue in the case being the title to the above 150 acres (referring to the 150 acres adjudged to appellees), plaintiffs already owning the remainder decreed

to them before this suit was filed and about which there was no dispute, it is ordered that plaintiffs pay all costs of this proceeding."

This judgment, presumably, was rendered under the provisions of article 1438, Revised Statutes, authorizing the court for good cause shown, to be stated in the record, to adjudge the costs otherwise than as provided in article 1425, which latter article provides that the successful party shall recover all costs.

It is expressly provided in article 5270, Revised Statutes, with reference to suits in trespass to try title, that where the defendant claims the whole premises, and the plaintiff shows himself entitled to recover part, the plaintiff shall recover such part and costs. It is not necessary to decide whether this article is to be construed in connection with article 1438 above referred to, or whether the latter article applies at all to suits in trespass to try title. In the present case appellees by their plea of not guilty admitted their possession or claim of title to the entire premises (Art. 5258, Rev. Stats.), and this claim was emphasized by their plea of the statute of limitations wherein they set up their possession of the entire premises. These pleadings put appellants upon proof of their title to the land adjudged to them. If they had failed in such proof judgment would have been against them, which would have been a bar to any claim on their part to the land finally adjudged to them. (Wooters v. Hall, 67 Texas, 513.) So far as the record shows the issues were made by the written pleadings alone, and these put in issue appellants title to the land recovered by them. In such case they were entitled to a judgment for costs, and the judgment against them for costs was error. (Koenigheim v. Miles, et al., 67 Texas, 120.)

Appellees could have protected themselves against a judgment for costs by promptly filing a disclaimer as to the land adjudged to appellants, if they claimed no title thereto. They chose rather to file such a pleading as put appellants upon proof of their title thereto. If they abandoned upon the trial their claim to all except the land recovered by them, and made no attempt to defeat appellants' claim to that adjudged to them, this would not authorize or justify a judgment against appellants for costs under the provisions of article 1438, Revised Statutes, in view of the written pleadings.

The judgment of the trial court as to costs is therefore reversed and judgment is here rendered in favor of appellants and against appellees for all costs including the costs of this appeal. In all other respects the judgment is affirmed.

Reversed and rendered in part, and affirmed in part.

PILOT POINT WATER WORKS v. R. C. FISHER.

Decided April 21, 1906.

Charge—No Issue—Error.

In a suit for damages for failure to repair a well as per contract, charge of the court considered, and held erroneous because submitting an issue not raised by the evidence.

Appeal from the County Court of Denton County. Tried below before Hon. I. D. Ferguson.

Walker & Mays and *Alvin C. Owsley,* for appellant.

Abernathy & Mangum and *Smith & Sullivan,* for appellee.

STEPHENS, ASSOCIATE JUSTICE.—This suit was brought March 9, 1905, by appellee against appellants to recover five hundred dollars, with interest, claimed to be due as provided in a written contract, dated November 12, 1903, which obligated appellants to "fix up, clean out and overhaul R. C. Fisher's well at his ginnery in Frisco, Texas, and put the same in good shape and running order," and which further provided as follows: "but in case said well does not perform satisfactorily and do what is reasonable for such well to do and to furnish, then the said R. C. Fisher shall notify the Pilot Point Water Works and they hereby agree to come and remedy the defects if such defects can be remedied, and further if it developes that the well can not be fixed and made to do good work then on or before November 12, 1904, the Pilot Point Water Works agrees to either sink a new well or to pay back to the said R. C. Fischer the sum of ($500) five hundred dollars."

The answer of appellants pleaded compliance with the contract on their part as far as possible, and charged appellee with negligence in throwing cinders and ashes around the well and permitting the same to fall between the casing and pump pipe, "thereby wedging the pipe and casing in so tight that it rendered it impossible to ever pull either the casing or pump pipe," to which their final inability to remedy the defects in the well was ascribed.

The replication to this answer was to the effect that appellants had control of the well all the time, and were themselves to blame for its irremediable condition.

The evidence clearly raised the issue of negligence, as alleged, on the part of appellee, but there was no evidence whatever that appellants had the exclusive control of the well during the year covered by the written contract, in which the well was to be repaired and tested, for it was not only on the premises of appellee, but was used or attempted to be used by him during that time, while appellants only went to it or sent a man there to remedy defects when called on by the appellee.

The court erred in giving the following charge, since the evidence did not raise the issue, and since it deprived appellants of the benefit of a preceding paragraph of the charge submitting the issue of appellee's negligence raised, as above indicated, both by the pleading and evidence: "The jury is instructed that you will determine from all the evidence before you whether or not the well was under the control of the plaintiff or under the control and management of the defendant from November 12, 1903, until November 12, 1904, and should the jury find and believe from the evidence that the well was under control and management of the defendants and that you should find and believe that the defendants knew of the condition of said well and the existence of cinders and that the same would probably obstruct the well then it would be the duty of defendant to exercise ordinary care and prudence to prevent the

cinders and other substances from getting into said well, and if the jury find and believe from a preponderance of the evidence that the defendant had control and management of the well and that it was in such a condition as to endanger the well by the accumulation of cinders and you find that it became *choked* so that the pump pipe could not be drawn out and that for that reason the well could not be repaired and put in condition as the contract called for, then you are instructed that the defendant would not be released from liability on said contract."

In the second paragraph of the charge the court added to the language of the contract the following: "And to furnish sufficient water as was contemplated and understood by the parties in said contract," which, to say the least, was superfluous, and should have been omitted.

Assignments raising all other questions are without merit.

For the error first pointed out the judgment is reversed and the cause remanded.

Reversed and remanded.

R. G. BENNETT v. MATTIE TAYLOR, EXECUTRIX.

Decided April 21, 1906.

Surety—Discharge of—Negligence of Payor.

Where, at the time a promissory note was executed by a principal and surety, the principal gave to the payor a chattel mortgage to secure the payment of said note, and the payor negligently failed to have said mortgage registered, whereby the security was lost, the surety was thereby discharged.

Appeal from the County Court of Baylor County. Tried below before Hon. B. M. Britain.

D. A. Holman and *Dickson & Britain,* for appellant.

SPEER, ASSOCIATE JUSTICE.—Carter Taylor sued A. L. Stell and R. G. Bennett in the County Court of Baylor County to recover on a promissory note for $400 with interest and attorneys' fees. Defendant Bennett answered to the effect that he signed the note as surety for Stell, which fact was known to plaintiff, and with an agreement upon the part of Stell that he (Stell) would give the plaintiff a mortgage on one hundred head of unincumbered cattle, which he did at the time he gave the note; that plaintiff accepted said mortgage but negligently failed to file the same for registration until after this suit was filed, and until after the mortgaged property was disposed of by Stell by valid mortgages and otherwise, so that the same was entirely lost to plaintiff and defendant Bennett as security for said debt. Upon the death of plaintiff Taylor, his wife Mattie Taylor, as his executrix, was substituted as plaintiff and the suit was prosecuted to judgment in her name and favor. Bennett has appealed, and insists that he is entitled to a reversal and rendition of the judgment in his favor upon the undisputed facts, and we must sustain his insistence.

There is no question in the evidence but that appellant was a surety on the note, and known to plaintiff Taylor to be such, nor is there any

question but that more than enough mortgaged cattle to pay the debt, belonging to the principal Stell, were lost as security through the negligent failure of Taylor to file his chattel mortgage for registration. This being the case upon the most obvious principles of equity, involving the right of Bennett as surety upon the payment of the note, to be subrogated to the right of the holder in the mortgaged chattels, and the consequent duty of the holder of the mortgage, as trusteee for all interested parties, to do nothing inconsistent with that right, we think appellant is entitled to be discharged as surety for the debt. (Murrell v. Scott, 51 Texas, 526; Brandt on Suretyship and Guaranty, secs. 426, 427, 440, 442 and 445; Pomeroy's Equity Jurisprudence, vol. 4, sec. 1419.

Reversed and rendered in favor of appellant.

Reversed and rendered.

C. H. PARHAM v. M. B. LANGFORD ET AL.

Decided April 21, 1906.

1.—Assault and Battery—Suit for Damages.

The provisions of the Penal Code to the effect that no verbal provocation justifies an assault and battery, but insulting and abusive words may be given in evidence in mitigation of the punishment affixed to the offense, are declaratory of the general principle which applies in a civil suit for damages for assault and battery.

2.—Female Servant—Protection by Employer—Slander.

A female helper or servant, without any other protector in the community, may be considered as under the protection of her employer in a matter of slanderous charges.

3.—Truth of Slanderous Charges—Knowledge of Defendant.

In a suit for exemplary damages for assault and battery, caused by slanderous words spoken of an inmate of defendant's family, it was not error to exclude testimony as to the bad character of the woman in a distant State many months prior to the assault, in the absence of evidence that the defendant knew of such character.

4.—Charge Without Evidence.

Because there was no evidence to warrant it, it was error for the court to charge the jury that they might consider, in mitigation of damages, any action or conduct of plaintiff that was reasonably calculated to bring on or cause the assault by which he was injured.

Appeal from the District Court of Baylor County. Tried below before Hon. J. M. Morgan.

D. A. Holman and *D. F. Goss,* for appellant.

Glasgow & Kenan, J. T. Montgomery and *Dickson & Britain,* for appellees.

CONNER, CHIEF JUSTICE.—This appeal is from a judgment against appellant who sued appellees M. B. Langford, Doc Parsons and another for damages to his person received in a difficulty between the parties

named. Appellant alleged that the assault upon him by appellees was unlawful, willful and malicious, and he prayed for both actual and exemplary damages.

The principal contention here, and with which we must agree, is that the verdict and judgment are contrary to the law and the evidence. The uncontradicted evidence is that appellant had made remarks derogatory to a young lady who was an inmate of the home of appellee Langford in the capacity of a helper to Mrs. Langford; that appellee Doc Parsons was also an inmate of the Langford household; that upon the occasion in question the parties met; that appellee Langford inquired of appellant if he had made certain remarks construed by appellees as slanderous; that appellant acknowledged that he had made the remarks imputed to him; that thereupon appellee Doc Parsons, using an opprobrious epithet, struck appellant and the fight began. It is also undisputed that appellee Langford assisted Doc Parsons in the fight. They were therefore undoubtedly principals and alike liable for results.

The alleged slanderous language mentioned was the only defense interposed by appellees on the trial and none other is relied upon here as supporting the judgment. It is statutory with us, however, that "no verbal provocation justifies an assault and battery, but insulting and abusive words may be given in evidence in mitigation of the punishment affixed to the offense."

Penal Code, article 505. While the statute quoted is in the penal code and relates to offenses for which prosecution may be maintained, it nevertheless is but declaratory of the general principle which applies to the facts of this case. It follows, therefore, that however unjustifiable, if it was so, may have been appellant's language in reference to the young lady inmate of Mr. Langford's home, it did not justify the assault. The language, at most, but went in mitigation of the exemplary damages appellant sought to recover. There being no justification in law for the assault, appellees were liable at all events for the actual damages that resulted therefrom.

Appellant insists that the young lady referred to was not under the protection of the appellee Langford, her relation to the family being that merely of a servant. We are not, however, inclined to support this contention. The proof fails to show that she had any other protector in the community, and we think that she was at least under the temporary protection of appellee Langford. But whether so or not, the relation of appellees to the young lady in question, together with all the other facts and circumstances, was proper for the consideration of the jury upon the issue of exemplary damages.

Appellant complains of the action of the court in excluding evidence offered by him for the purpose of showing the truth of his statements reflecting on the chastity of the young lady in question, in order to "prove the general character of the female insulted to ascertain the extent of the provocation" and "to enable the jury to act advisably reflecting the appropriate punishment" by exemplary damages. The evidence offered consisted of the depositions of persons in Tennessee, whose testimony tended to show the general character of the young lady alluded to in that State, and the record fails to show that appellees, at and prior to the time of the assault, knew of such general character. We therefore

think the court's ruling correct. It must be remembered that appellant was seeking to inflict upon appellees a punishment by way of exemplary damages. If appellees, by general reputation in the community in which the young lady lived or otherwise, knew that she was of bad character and knew that appellant's language was justified by the facts, then, indeed, a jury might infer that appellees' assault was flagrantly malicious. On the contrary, however, whatever may have been the conduct or general character of the young lady in Tennessee many months prior to her location in Texas, if appellees were without knowledge thereof, and if while in the family of appellee and during her residence in Texas, her conduct, character and demeanor had been such as to impress appellees with the belief that she was entitled to the protection of an innocent woman, then a jury might well decline to deal with appellees so severely in the way of punishment. The question when determining to what extent appellees should be punished was, How did the facts and circumstances as known to them operate upon their minds? Were they such as to reasonably produce that state of mind entitling them in the judgment of the jury to a mitigation of exemplary damages? The general character of the young lady in question, prior to the difficulty, in the community in which she had been living in Texas would doubtless be admissible as affording a reasonable presumption that appellees knew what it was, but as stated, we think her acts and general reputation in a distant State, many months prior to the difficulty, were too remote and inadmissible without evidence tending to show that appellees had knowledge thereof.

We think appellant's seventh assignment, objecting to the action of the court in giving the special charge, well taken. The charge was to the effect that the jury might consider in mitigation of damages any action or conduct of plaintiff that was reasonably calculated to bring on or cause the assault by which he was injured. We see nothing in the record calling for this special charge. There is nothing in the evidence indicating that at the time of the assault appellant did any act calculated to bring it on. True, he acknowledged the use of the words imputed to him, but this acknowledgment, together with all the other circumstances, simply constituted a part of the case to be considered by the jury and no necessity existed for the special emphasis said special charge was calculated to give.

All assignments not disposed of by the foregoing conclusions are overruled, but because the verdict and judgment are contrary to the law and evidence on the issue of actual damages, the judgment is reversed and the cause remanded.

Reversed and remanded.

JOHN FRIEND, ADMINISTRATOR, v. JOE BOREN ET AL.

Decided April 21, 1906.

1.—Certiorari to County Court.

A failure to appeal from an order of the County Court discharging an administrator does not preclude the remedy by certiorari, and the latter remedy is not dependent upon a showing why the remedy by appeal was not pursued. Nor will

the fact that the administrator was discharged by order of the County Court, and the entire estate paid out, prevent the District Court from reviewing the proceedings in the County Court.

2.—Claim for Indian Depredations—Fee for Collecting.

The owner of a claim for Indian depredations can not lawfully contract to pay an amount in excess of fifteen percent thereof for expenses and fees in collecting the same.

Appeal from the District Court of Montague County. Tried below before Hon. D. E. Barrett.

Hunter & Hunter, W. S. Jamison and *H. W. Hunt,* for appellant.

Admire & Wilkerson and *Chambers & Cook,* for appellees.

CONNER, CHIEF JUSTICE.—Appellees Joe Boren, and Blanch Norman joined by her husband, I. A. Norman, filed their petition in the District Court of Montague County on the 29th day of April, 1904, in which they complained of appellant John Friend as the administrator of the estate of Mack Boren, deceased, the father of Joe Boren and Blanch Norman. It was charged that appellant as administrator had received $5,642 from the United States government as compensation for losses sustained by said decedent from depredations of hostile Indians; that said estate had been paid by appellant without legal order therefor to certain heirs of said Mack Boren other than the petitioners, and to certain other persons without right; that appellant on January 21, 1903, filed his final report as administrator in the County Court of Montague County, showing the payments as stated, and secured its approval and his discharge as administrator. The petitioners alleged that they, as heirs, were entitled to, but had received no part of said estate; that they had no notice of said proceeding and they prayed that a writ of certiorari issue to the County Court to the end that said proceedings therein might be reviewed in the District Court and said final report restated and appellees awarded the several shares of the estate mentioned to which they were entitled. The writ of certiorari issued and the trial in the District Court, which under our law was a trial de novo, resulted mainly as prayed for by appellees.

The first, second and third assignments of error are briefed together and relate to the sufficiency of appellees' petition. The second and third, however, are in violation of the rules and do not require consideration, so that we have but to determine the first, which complains of the action of the court in overruling the general demurrer. Appellee's petition we think undoubtedly good on general demurrer. The petition was filed within the statutory period, and a failure to appeal from the order of the County Court approving the final report and discharging appellant as administrator did not preclude the remedy by certiorari, of which appellees seasonably availed themselves. Under our law the latter is as distinctly statutory, and hence legal, as the former, and is not made dependent upon a showing of cause why the remedy of an appeal was not pursued. (Rev. Stats., art. 332; Linch v. Broad, 70 Texas, 94; Wipff v. Heder, 6 Texas Civ. App., 693.) Nor will the facts that

appellant had paid out the entire estate, and that the County Court entered an order finally discharging him take from the District Court the power to review the proceedings below and to restate the administrator's account in accordance with the law and the evidence. (McShan v. Lewis, 76 S. W. Rep., 616; Richardson v. Kennedy, 74 Texas, 507.)

Under the fifth and tenth assignments, the contention, in substance, is made that appellant was authorized to pay out of the said sum received from the government fifty percent thereof, as was done, to Silas Hare, John G. Hagler and appellant himself by virtue of an order of the County Court purporting to authorize a contract to that effect entered into between the persons named and a former administrator. The contract referred to was in legal effect similar to the contract construed by this court in the case of Lynch v. Pollard, 62 S. W. Rep., 945. We there held that the owner of an Indian depredation claim could not under the act of Congress relating to such claims, lawfully contract, as was done in this case, to pay a person out of the sum collected for expenses and as fees in prosecuting the claim an amount in excess of the 15 percent allowed by the court of claims and permitted by the act. We see no sufficient reason for changing the conclusion announced in that case, nor is it necessary to repeat what we there said. See also Spofford v. Kirk, 97 U. S., 484. If the owner of the claim can not so contract, we do not see how his legal representative can do so. If forbidden by law the order of the County Court could not and did not give the contract validity. Courts can not any more than individuals contravene lawful enactments of the Congress. It follows that the District Court in restating appellant's account as administrator properly excluded the payment to Hare, Hagler and Friend. This conclusion leads to the further conclusion that the account, as restated by the District Court, was correct, and that appellees were entitled to the sums severally awarded to them. We also think the court properly awarded to certain heirs of Mack Boren, deceased, not parties to the suit, the distributive share of the estate to which they were entitled. It was the duty of the court in restating the account to ascertain who the heirs were, and to make the proper disposition of the estate not lawfully paid out by the administrator. (Rev. Stats., arts. 2198 et 2202, and Reese v. Hicks, 13 Texas, 164.)

The conclusions stated render questions presented by other assignments immaterial. We therefore overrule all assignments, find that the material allegations of appellees' petition are supported by the evidence, and affirm the judgment of the District Court.

Affirmed.

Writ of error refused.

ARMOUR AND COMPANY v. W. R. DUMAS.

Decided April 21, 1906.

1.—Personal Injury—Fellow Servant—Assumed Risk.

In a suit against the owner of a building for personal injuries caused by stepping upon an upturned nail or spike during the construction of the building it appearing from the evidence that the plaintiff was one of many workmen engaged in the construction of said building, with no authority the one over the other, such workmen were fellow servants, and each assumed, when he entered the common employment, the risk incident to the negligence of the others, and the injury having occurred from the negligence of said fellow servants, the owner of the building was not liable.

2.—Safe Place to Work—Duty to Furnish—Exception to Rule.

To the rule that it is the duty of the master to furnish the servant a safe place to work there is an exception, viz., the master is not liable where the danger to which the employe is exposed is merely transitory, due to no fault of plan or construction, but is one where the work is of such a character that as it progresses the environment of the servant must necessarily undergo frequent changes, and the injury is attributable to one of such transitory changes. In such cases the rule that the master can not delegate to another the duty of supplying a safe place to work has no application.

Appeal from the District Court of Tarrant County. Tried below before Hon. Mike E. Smith.

West, Chapman & West and *Theodore Mack,* for appellant.—The rule that it is the duty of the master to exercise ordinary care to provide a reasonably safe place of work for the servant is not applicable to cases in which the work which the servant is employed to do is of such nature that its progress is constantly changing the conditions as regards the increase and diminution of safety. The hazards thus arising as the work proceeds are regarded as being ordinary dangers of the employment, and by his acceptance of the employment, the servant necessarily assumes them. If the conditions thus exemplified are proximately caused by negligence of fellow servants, recovery is denied as a result of the proposition of the doctrine of fellow servants or common employment. Armour v. Hahn, 111 U. S., 313; Hough v. Texas & Pac. R. R. Co., 100 U. S., 213; Randall v. Baltimore & O. R. R. Co., 109 U. S., 478; Whitaker v. Bent, 167 Mass., 588; 2 Labatt on Master and Servant, sec. 587; Allen v. Galveston, H. & S. A. R. R. Co., 37 S. W. Rep., 171; 1 Labatt on Master and Servant, sec. 269; 2 Labatt on Master and Servant, sec. 588.

D. W. Puchett and *W. C. Prewitt,* for appellee.—The obligation of the master to see that the place where his servant is required to work is reasonably safe, is primary, absolute and nonassignable, in the sense that the master is responsible for the negligence of any servant or agent of whatever grade, to whom he delegates performance of it. San Antonio, etc., Ry. Co. v. Adams, 6 Texas Civ. App., 102; Texas, etc., Ry. Co. v. Bingle, 16 Texas Civ. App., 653; Texas, etc., Ry. Co. v. Whitmore, 58 Texas, 276; Houston, etc., Ry. Co. v. Dunham, 49 Texas, 181; Houston, etc., Ry. Co. v. Marcelles, 59 Texas, 334; Sabine, etc., Ry. Co. v. Ewing, 1 Texas Civ. App., 531; 4 Thompson's Law of Negligence, art.

3874 and notes; Chicago, etc., Ry. Co. v. Eaton, 62 N. E. Rep., 784; Davis v. Central Vermont Ry. Co., 55 Vt., 84; Galveston, H. & S. A. Ry. Co. v. Manns, 11 Texas Ct. Rep., 754; San Antonio, etc., Ry. Co. v. Brooking, 51 S. W. Rep., 537; Texas, etc., Ry. Co. v. Echols, 25 S. W. Rep., 1087; Texas, etc., Ry. Co. v. French, 86 Texas, 96; Gulf, etc., Ry. Co. v. Brentford, 79 Texas, 619; International & G. N. Ry. Co. v. Johnson, 23 Texas Civ. App., 160; Grace, etc., Co. v. Kennedy, 99 Fed. Rep., 679; Jensen v. Hudson Saw Mill Co., 73 N. W. Rep., 434.

SPEER, ASSOCIATE JUSTICE.—Appellee recovered a judgment against appellant for personal injuries sustained by him in stepping upon the points of some upturned nails protruding through a piece of board lying upon the floor of the building in which he was at work. The paragraph of the court's charge upon which the recovery was had, and which indicates the negligence relied on, is as follows: "If you believe and find from the evidence that defendant's foreman in charge of the workers with whom plaintiff was engaged on the occasion of his alleged injury, or if defendant's employes (if any) charged with the duty of keeping the floor clean of rubbish failed to use ordinary care to see that the floor where plaintiff was working was reasonably safe, then defendant would be guilty of negligence; and if by reason of such failure (if any) a piece of timber with spikes or nails therein with upturned points was left and permitted to remain upon the floor; and if plaintiff, while in said room, pursuant to the discharge of his duties, jumped or stepped upon said spikes or nails and was thereby injured; and you find plaintiff's injury was the direct result of such negligence (if any you find), and plaintiff is not precluded from a recovery by subsequent instructions herein, then your verdict will be for the plaintiff. But if you do not believe that the employees of the defendant above mentioned were guilty of negligence in the matter herein submitted to you, then plaintiff could not recover." The "subsequent instructions" comprehended charges to the effect that if appellee knew of the presence of pieces of timber with nails in them, he assumed the risk of the danger and that if he was guilty of contributory negligence he could not recover. So that, as thus qualified, we are confronted with the question, does the charge quoted state a correct proposition of law as applied to the facts of this case? We are of opinion it does not. The evidence shows that appellee, together with a number of other employees, was engaged in the construction of a large building for appellant. There was what was known as a sweeping gang, whose duty it was to sweep up the trash, pieces of boards, nails, et cetera, into piles in the basement room where appellee was engaged in mixing concrete for the building, and if there was any negligence shown, it was that of the employees constituting this sweeping gang. The carpenters, the sweeping gang and appellee, all being engaged in the common work of erecting the building, with no authority the one over the other, were fellow servants, and the negligence of the others was assumed by each when he entered the common employment. But it is insisted that the duty of exercising care to furnish a reasonably safe place to work, resting upon appellant, was absolute and nonassignable. But to this general rule there is the well-known exception that the master is not liable where the danger to which the employee is exposed

is merely a transitory one, due to no fault of plan or construction, but is one where the work is of such a character that as it progresses the environment of the servant must necessarily undergo frequent changes, and the injury is traceable to one of these transitory changes. This exception finds its illustrations for the most part in cases involving the construction of works. (Armour v. Hahn, 111 U. S., 313; Durst v. Carnegie Steel Co., 173 Pa., 162; Butler v. Townsend, 126 N. Y., 105; 2d Labatt, Master & Servant, secs. 587, 588 and 612a.) The authorities cited by appellee do not involve the exceptional condition of affairs here adverted to, but are cases of completed structures or places or work for the servant and are fit instance of the application of the general rule that the master can not delegate to another the duty of supplying a safe place to work.

Under the undisputed facts, appellee received his injuries from a cause the risk of which he assumed, and can not recover.

The judgment is therefore reversed and here rendered in favor of appellant.

Reversed and rendered.

Writ of error refused.

SOUTHERN KANSAS RAILWAY COMPANY OF TEXAS v. B. A. SAGE.

Decided April 21, 1906.

1.—Juror—Challenge for Cause.

The fact that a juror is prejudiced against a person who is to be an important witness for defendant is not a statutory ground of challenge for cause; but a challenge for this cause might properly be sustained in the discretion of the court, under art. 3298, of the Revised Statutes, making that a challenge for cause "which, in the opinion of the court, renders the juror an unfit person to sit on the jury."

2.—Cause of Wreck—Expert Testimony.

The testimony of a witness for defendant, who was qualified to testify as an expert, "that he failed to find, from examining the wreck, any cause which produced it, and that it often happened in railroading that wrecks occur, and a careful examination fails to disclose any cause for it, and the wreck in which plaintiff was injured was one of that kind," was not subject to the objection that it was irrelevant and immaterial, and should have been admitted.

3.—Pleading of Defendant—Evidence.

Where in a suit for personal injuries the defendant pleads contributory negligence on the part of plaintiff, testimony of the plaintiff tending to disprove the charge of contributory negligence is admissible under the pleading of the defendant, though not under that of plaintiff.

4.—Exclusion of Testimony—When Harmless.

Where it appears from the record that testimony excluded at one time during the trial was admitted at another, the error in the ruling of the court, if any, was harmless.

5.—Charge of Court—Construction.

The charge of the court should be considered and construed as a whole.

Appeal from the District Court of Roberts County. Tried below before Hon. B. M. Baker.

J. W. Terry, H. E. Hoover and *R. E. Taylor,* for appellant.—When it appears from the *voir dire* examination of a juror that his prejudice against a witness of the defendant is so great that he could not give proper weight to his testimony, he being an important witness for the defendant, and that to the extent that he disliked such witness, he might be influenced in his verdict against the defendant, such juror is not an unbiased juror, such as contemplated by statute, and it is error to overrule a challenge to such juror for cause. Sayles' Statutes, arts. 3141, 3207 and 3208; Couts v. Neer, 70 Texas, 468; Houston & T. C. Ry. Co. v. Terrell, 69 Texas, 650.

Plaintiff having charged specific acts of negligence, could give evidence of no other act or omission on the part of defendant. Evidence of other acts than those charged in the petition as responsible for the wreck, which, from the evidence in the case, probably influenced the verdict of the jury, was error. Sayles' Statute, art. 2299, rule 5; Gulf, C. & S. F. R. R. Co. v. Beall, 43 S. W. Rep., 605; Gulf, C. & S. F. R. R. v. Rowland, 82 Texas, 170, and cases there cited; 13 Enc. P. & P., p. 908.

It being the contention of the defendant that the wreck was a risk incident to the employment of plaintiff, and the witness Starkweather, having shown sufficient experience in such matters, and having testified that he was present and helped clear up the wreck and had carefully examined the same as to the cause which had produced it, it was competent for the defendant to prove by said witness that he failed to find any cause which produced the wreck, and further that wrecks often occur and no cause could be discovered which produced them. Ethridge v. San Antonio & A. P. Ry. Co., 39 S. W. Rep., 204; Myers v. State, 37 Texas Crim. Rep., 333; Galveston, H. & S. A. Ry. Co. v. Pitts, 42 S. W. Rep., 255; Gulf, C. & S. F. Ry. Co. v. Richards, 83 Texas, 206; Galveston, H. & H. Ry. Co. v. Bohan, 47 S. W. Rep., 1050; Ft. Worth & D. C. Ry. Co. v. Thompson, 75 Texas, 503.

The law only requires of a railroad to exercise ordinary care to keep and maintain its track in a reasonably safe condition for the running of its trains thereon, and it is not the duty of the railroad company to keep and maintain its track in that condition, and it was error for the court to charge the jury that it is the duty of a railroad company to keep its roadbed in a reasonably safe condition for running its trains thereon, because the road is only charged with the duty of exercising ordinary care in this particular. San Antonio & A. P. Ry. Co. v. Robinson, 73 Texas, 277; International & G. N. Ry. Co. v. Welch, 86 Texas, 203; Baker et al. v. Ashe, 80 Texas, 360; Missouri, K. & T. Ry. Co. v. Rodgers, 89 Texas, 680.

H. G. Hendricks, John W. Veale and *C. Coffee,* for appellee.

STEPHENS, Associate Justice.—This is the second appeal in this case. (Southern Kan. Ry. Co. of Texas v. Sage, 80 S. W. Rep., 1038, and 84 S. W. Rep., 814.)

The first assignment reads: "The court erred in overruling and in refusing to sustain the defendant's peremptory challenge to the juror, Mim Smith, for the reasons and as will more fully appear from defendant's bill of exceptions No. 1." It distinctly appears from this bill of exceptions that appellant was not only permitted, but was *required* to eliminate this juror from the panel by a "*peremptory* challenge;" so that if taken literally the assignment would have to be overruled for not being sustained by the record. It appears, however, from the bill of exceptions that the juror was objected to on the ground of his being prejudiced against an important witness that appellant expected to use and did use on the trial. But no such ground of challenge for cause is found in our statute. The fourth subdivision of article 3141 makes "bias or prejudice in favor of or against either of the parties" a ground of disqualification, and the next preceding subdivision declares that "any person related by consanguinity or affinity within the third degree to either of the parties to the suit" shall be disqualified to serve as a juror. If, as appellant seems to contend, prejudice against an important witness for one of the parties amounts to prejudice against the party himself within the meaning of the fourth subdivision, then it would seem but logical to hold a juror to be disqualified under the third subdivision "as a person related" to one of the parties within the prohibited degree because he is related to his witness, which proves too much. The challenge might, however, we think, have been properly sustained under article 3208, making that a challenge for cause to a particular juror "which, in the opinion of the court renders him an unfit person to sit on the jury." But such ground of challenge would involve the exercise of judicial discretion, and unless abuse of such discretion be shown and it be "made clearly to appear that thereby the party complaining has been deprived of a trial by a fair and impartial jury," the case cited by appellant of Couts v. Neer, 70 Texas, 468, from which we have just quoted, would itself seem to be sufficient authority for overruling the assignment. No abuse of discretion is shown, and the only injury complained of is that appellant was forced to exhaust his peremptory challenges in order to get rid of Smith as a juror, and in consequence thereof was forced to accept another juror it would have challenged peremptorily, but who, for aught that appears, was fair and impartial.

Numerous rulings on the admission and exclusion of testimony are complained of in appellant's brief, in assignments second to fourteenth, all of which have received careful and patient consideration, but while all must be overruled only those will be discussed which we have found more or less difficult to dispose of.

We quite agree with appellant, as alleged in the eleventh assignment, that "the court erred in refusing to permit the defendant to prove by the witness G. C. Starkweather that he failed to find, from examining the wreck, any cause which produced it, and that it often happens in railroading that wrecks occur and that a careful examination fails to disclose any cause for it, and the wreck in which the plaintiff was injured was one of that kind." The objection offered to this testimony was, that it was "irrelevant and immaterial." Whatever other objection the latter portion of it may have been subject to, the testimony as a

whole was certainly neither irrelevant nor immaterial, which was the only objection made, and which therefore excluded all others. This witness, who seems to have had considerable experience in the examination of railroad wrecks, made a careful examination of the wreck in question immediately after it occurred. No reason is perceived, therefore, why he was not permitted to at least state that he failed to find the cause of the wreck, especially as two other witnesses offered by appellant and similarly situated were permitted to so testify. However, it appears from stenographer's notes (page 163) that his examination of the wreck included first of all an inquiry of the train crew as to the cause thereof, though the objection made did not point this out. But whether this ruling, though erroneous, necessitates a reversal of the judgment is another question. The material inquiry was, not so much whether the witness had or had not been able to trace the cause of the wreck as whether it had been caused by the alleged defective condition of the track, and as to this he was permitted, after fully describing what he saw, to give his opinion and testify that he did not think the condition of the track caused the wreck, as will be seen from the following quotation from the stenographer's notes: "Q. I will ask you if when you got there that day and made your examination of this wreck, and while you were clearing up the wreck, if you found any cause for the wreck? A. It would be a supposition on my part to say what caused the wreck. Q. Do not give your suppositions, but I will ask you this question: Do you think the condition of the track caused the wreck. A. I do not think it did." We are therefore of opinion that appellant was really not deprived of any substantial benefit by the ruling complained of and that it should not therefore work a reversal of the judgment.

The evidence of appellee, which was admitted over objection, set out in the fifth assignment as follows, "that in making the run from Canadian with his train, as it was backing up, he had the second engine, and engineer Zook had the forward engine; that Zook had charge of the air and full control of the train; that he was not allowed to use the air and had no management or control over the train and that he could not use his air, except on a signal from Zook," was not relevant, perhaps, to any issue tendered in his petition, but as the answer tendered the issue of contributory negligence, charging him with backing up the train at a dangerous rate of speed, appellant is not in position to claim a reversal of the judgment because of the admission of this testimony.

In the eighth assignment complaint is made of the court's refusal to permit appellant to prove by Dr. Gun, a witness for appellee, that "a failure to use an arm for three or four years would cause it to become atrophied, shrunken and of little use, and much in the same condition in which he found the plaintiff's arm;" but near the bottom of the sixty-second page of appellant's brief, under another assignment, we find this statement: "Dr. Gun, the plaintiff's witness, who had examined him for the sole purpose of testifying in the case, reluctantly admitted that non-use would practically destroy a muscle." From the stenographer's transcript (page 63) it appears not only that appellant received the full benefit of the excluded evidence but also that counsel for appellee finally withdrew the objection first made and sustained, which explains the seeming inconsistency.

Passing over without comment the fifteenth assignment, complaining of the argument of counsel, to which we find no serious objection, we come to assignments sixteenth to twenty-sixth, which complain of the action of the court in giving and refusing charges. All those complaining of the court's refusal to give charges are overruled, because the charge given sufficiently covered every material issue raised by the pleadings and evidence. As to those complaining of the different paragraphs of the charge, it is perhaps sufficient to say that the charge given on the former trial seems to have been copied on the last, except what was condemned by the opinion of the Supreme Court on writ of error. Some objections are now presented, however, which do not seem to have been urged on the former appeal (the record being now in the Supreme Court), and as the judgment was affirmed by this court there was no occasion to consider objections not made, as there perhaps would have been had the judgment been here reversed and the cause remanded for a new trial. Inasmuch as the charge was copied in full in our opinion on the former appeal, and inasmuch as the cause was remanded for a new trial by the Supreme Court, with the charge thus brought conspicuously to their attention, the trial court doubtless felt justified in concluding that, except insofar as it was criticised, it received the approval of the Supreme Court and might safely be given on another trial. But however this may be, after carefully considering these new objections to the charge, we have finally concluded that they should all be overruled; for, while some of them may seem to be well taken when confined to the particular paragraph objected to, nevertheless, when all the paragraphs are read together none of the objections seem to be tenable. To illustrate: the seventh paragraph, which is identical with the tenth on the former appeal (80 S. W. Rep., 1040), is objected to on two grounds: first, because it imposed on the railway company the duty of keeping its roadbed in a reasonably safe condition for running its trains thereon, when it "is only charged with the duty of exercising ordinary care in this particular;" and second, because the charge gave undue prominence to the obligation of the railway company to keep its track in a reasonably safe condition, rather than to use ordinary care to see that it is kept in such condition. The latter objection was made and disposed of on the former appeal, but the former does not seem to have been. But it will be seen that the issue submitted in paragraph seven on the last trial and paragraph ten on the first, was the issue of assumed risk, as to which no proposition is submitted under the assignment, and not the issue of appellant's obligation either to keep its roadbed in a reasonably safe condition, or to exercise ordinary care to do so, which issue had been distinctly, fully and correctly submitted in preceding paragraphs, one of which was referred to by number in the paragraph in question. Not only so, but the court had pointedly instructed the jury in another of the preceding paragraphs that if they found from the evidence that appellant had "exercised ordinary care in keeping and maintaining its railway track at the point where the wreck occurred" in a reasonably safe condition for the purpose of running trains thereon, it was entitled to a verdict, "notwithstanding the fact that the train was wrecked, and that the plaintiff received injuries by reason thereof." Not even in the paragraph criticised was the duty of the railway com-

pany referred to as one to keep its track absolutely safe but only "in a reasonably safe condition," which is not too much to expect of one exercising proper care in operating a railway.

The remaining assignments complain of the court's refusal to grant a new trial, both because of the insufficiency of the evidence to warrant a recovery, and because the amount of the verdict was excessive; but we are unable to sustain any of these assignments, the case, as on former appeal, being one of conflicting evidence on both issues.

The judgment is therefore affirmed.

Affirmed.

Writ of error refused.

W. B. WORSHAM ET AL. v. J. C. DYER ET AL.

Decided April 21, 1906.

County Depositories—Act Construed.

Under the provisions of the Act of the Twenty-ninth Legislature, page 392, authorizing the selection of county depositories for county funds, when no bid is submitted for the entire amount of the county funds, the Commissioners' Court has the authority to select a depository for a portion of the county funds, the bid of such depository being for a part only of such funds, and in other respects in compliance with the law.

Appeal from the District Court of Clay County. Tried below before Hon. A. H. Corrigan.

R. E. Taylor and *H. A. Allen,* for appellants.

J. H. Barwise, Jr., and *W. T. Allen,* for appellees.

SPEER, ASSOCIATE JUSTICE.—W. B. Worsham, W. H. Featherston, and J. D. Stine filed an application for injunction against J. C. Dyer, county treasurer of Clay County, S. A. Denny, county judge, and J. W. Hardin, W. B. Corlett, M. Gilbert and J. K. Gault, county commissioners respectively, and the Merchants and Planters Bank of Henrietta, to restrain the county officers from turning over $30,000 of the county funds to the Merchants and Planters Bank of Henrietta, upon the ground that the action of the Commissioners' Court in the matter of selecting the Merchants and Planters Bank as a depository of the county funds to the extent of the amount named was illegal and void, and that for the county treasurer to obey its order and deposit said funds in said bank would be to jeopardize the same and inflict injury on the petitioners, who are citizens and taxpayers in the county and bondsmen as well on the county treasurer's official bond. There was a trial before a jury, but the district judge instructed a verdict for the defendants upon which judgment was entered in their favor, and the plaintiffs have appealed.

Whether or not appellants have any cause of complaint against the action of the Commissioners' Court of Clay County in awarding $30,000 of the county funds to appellee, the Merchants and Planters Bank, involves a construction of the Act of the Twenty-ninth Legislature,

page 392, authorizing the selection of county depositories for the county funds. The first section relating to county depositories (section 20 of the Act) authorizes the commissioners at stated times to receive proposals from bankers to act as the depository of the funds of such county, and provides for the advertisement for such bids. The next section declares how such bids shall be prepared and requires that the same shall be accompanied by a certified check as a guarantee of good faith on the part of the bidder. The next section prescribes the procedure for opening such bids, and makes it the duty of the Commissioners' Court "to select as the depository of all the funds of the county, the banking corporation, association or individual banker, offering to pay the largest rate of interest per annum for said fund; provided the Commissioners' Court may reject any and all bids;" it prescribes the method of computing the interest, directs the fund to which the same shall be credited, and authorizes the return of the checks of bidders whose bids have been rejected. The next succeeding section prescribes the time within which the successful bidder shall make bond, and that "said bond shall in no event be for less than the total amount of revenue of such county for the entire two years for which the same is made," and some other provisions not necessary here to notice. Section 24 makes it the duty of the county treasurer, immediately upon the making of an order selecting such county depository, to transfer to said depository all the funds belonging to said county and thereafter to deposit the funds of the county with such depository, and prescribes a penalty in favor of the depository for his failure to do so. Sections 25 and 26 we quote in full:

"Section 25. If for any reason there shall be submitted no proposals by any banking corporation, association or individual banker to act as county depository, or in case no bid for the entire amount of the county funds shall be made, or in case all proposals made shall be declined, then in any such case the Commissioners' Court shall have the power, and it shall be their duty, to deposit the funds of the county with any one or more banking corporations, associations, or individual bankers in the county or in adjoining counties, in such sums and amounts and for such periods of time as may be deemed advisable by the court, and at such rate of interest, not less than one and one-half percent per annum, as may be agreed upon by the Commissioners' Court and the banker or banking concern receiving the deposit, interest to be computed upon daily balance due the county treasurer; and any banker or banking concern receiving deposits under this section shall execute a bond in the manner and form provided for depositories of all the funds of the county, with all the conditions provided for same, the penalty of said bonds to be not less than the total amount of county funds to be deposited with such banker or banking concern."

"Section 26. When the funds of any county shall be deposited with two or more depositories, the Commissioners' Court shall select and name by order one of said depositories to act as a clearing house for the others, at which all county warrants shall be finally paid."

The undisputed evidence shows that on the day provided by law for the selection of county depositories, the Commissioners' Court of Clay County met and opened the bid of appellee Merchants and Planters Bank, which was the only bid before it, and selected that bank as the

depository for county funds to the amount of $30,000 upon its bid to act as county depository for such amount of its funds, and required it to execute a bond properly conditioned in the sum of $40,000, which it had agreed to do in its bid. The insistence of appellants is that any attempt to select a county depository for an amount of the county funds less than the whole is unauthorized by law and void; but the most casual reading of section 25 above quoted discloses that the Legislature has provided in cases such as here, where there is no bid for the entire amount of the county funds, as well as in some other cases, the Commissioners' Court have the power, and it is made their duty, to deposit the funds of the county in such sums and amounts and for such periods of time as may be deemed advisable by the court, and at such rate of interest, not less than one and one-half percent per annum, as may be agreed upon by the parties. There being absolutely no other bid before the court than the Merchants and Planters Bank's bid, and that being for a part only of the funds, the Commissioners' Court had full power, and it was their official duty, if they deemed it advisable, to award to this bank the sum of money bid for upon the rate of interest bid, which was in excess of the minimum prescribed by the Act. If there remained any doubt of the power of the Commissioners' Court to deposit a part only of the county funds with a given depository, it disappears entirely when the provisions of section 26 are examined, for that section not only contemplates this very condition of affairs, but provides that the Commissioners' Court shall select one of the "two or more depositories," to act as a clearing house for the others.

There remains only to be considered the question of what effect should be given to appellant's allegations of fraud on the part of the Commissioners' Court in making the award to the bank it did. It is, of course, sufficient to say there is not the slightest evidence in the record to support these allegations. But the allegations themselves fall short of making a case, for it is nowhere asserted that appellee, the Merchants and Planters Bank, was a party to such fraud, and it is difficult to understand how it could be denied the fruits of a legitimate contract entered into with the county through its Commissioners' Court, when it was itself entirely free from the charge of fraud in procuring the contract.

Upon the undisputed facts the district judge properly directed a verdict in favor of appellees, and his judgment is in all things affirmed.

Affirmed.

Writ of error refused.

INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY v. JOHN N. ELLYSON ET AL.

Decided April 25, 1906.

1.—Proximate Cause—Evidence.

In a case where a plaintiff died during pendency of her suit for damages for personal injuries, and the action was continued by her heirs, who made themselves parties, the evidence is held sufficient to show that the proximate cause of the death was not such injury, but sickness from other causes, and the suit held maintainable, following ruling on previous appeal. Ellyson v. International & G. N. R. R. Co., 75 S. W. Rep., 868.

2.—Proximate Cause—Charge—Definition.

On the issue whether death was to be attributed to personal injury as its proximate cause, the evidence showing that it was brought about by a combination of weakened condition from the injuries and of an attack of diarrhoea, the following definition was held not erroneous: "The proximate cause is that which, in its natural sequence, unbroken by any efficient intervening cause, produces the death, and without which it would not have occurred. The remote cause is that which some independent force merely takes advantage of to produce a death which is not the natural and probable effect of such cause."

3.—Damages.

A verdict for $2,000 held not excessive in suit for personal injuries to a woman 82 years old, feeble, and incapable of earning anything, but suffering pain therefrom, the suit being a continuation by her heirs of her action pending at her death, and not one for injuries from her death.

Appeal from the District Court of Williamson County. Tried below before Hon. Victor L. Brooks.

S. R. Fisher (*N. A. Stedman,* of counsel), for appellant.—The definition given by the court of "proximate cause" was inaccurate and erroneous in that the court, in defining proximate cause, failed to advise the jury that a cause which induces, causes or sets in motion and renders effective for harm, the cause which is nearest to and directly produces the result—death—is nevertheless the proximate cause. Howard F. Ins. Co. v. Norwich, etc., Transportation Co., 12 Wall., 199; Freeman v. Mercantile Accident Assn., 156 Mass., 353; Neeley v. Ft. Worth, etc., Ry. Co., 96 Texas, 279; Texas & P. Ry. Co. v. Bigham, 90 Texas, 223, et seq., and authorities there cited; Brush Elec. L. & P. Co. v. Lefevre, 93 Texas, 604; Citizens Railway Co. v. Ford, 60 S. W. Rep., 680; Galveston, H. & S. A. Ry. Co. v. Kieff, 94 Texas, 338; Cole v. German, etc., Co., 124 Fed. Rep., 113, and cases cited.

The verdict of the jury is excessive, outrageous and unconscionable. Mrs. Ellyson was 82 years of age, of frail physique and incapable of earning anything; she did no work and made nothing. She was injured in a railroad collision and was confined to her bed from date of injury to time of her death. She suffered more or less pain. The jury awarded damages of $2,000.

G. W. Glasscock, Jno. W. Parker and *Cooper & Sansum,* for appellees.

FISHER, CHIEF JUSTICE.—This suit was originally brought by Mrs. Mary Ellyson to recover damages for personal injuries sustained by her while a passenger on one of the defendant's trains. The injuries were sustained in a collision at a crossing between the train in which she was a passenger and another train of the defendant, through the negligence of the agents and servants of defendant in charge of the trains. Mrs. Ellyson died November 1, 1902, and thereafter the appellees, as her heirs, suggested her death and made themselves parties plaintiff by filing their first amended original petition, upon which they went to trial. Trial before the court and jury resulted in a verdict and judgment in plaintiffs' favor for $2,000.

The principal question of law involved in this case was passed upon by this court in the former appeal of the case in 75 S. W. Rep., 868.

There is no controversy as to the fact of accident and the negligence of the appellant and the injuries sustained by Mrs. Ellyson. The only question of fact involved in this appeal is whether Mrs. Ellyson died from the effect of the injuries she received, or whether her death was attributable to a diarrhœa or bowel trouble. It is substantially conceded that this action can only be maintained by the appellees in the event it comes within the terms of article 3353a of the Revised Statutes, which we need not now discuss, as that provision of the law was construed by this court in its former opinion. If the proximate cause of her death was the injuries she received in the collision, the appellees can not recover; if the diarrhœa or bowel trouble was the cause, they are entitled to recover. It is seriously contended that the evidence establishes the fact that the injuries, and not the bowel trouble, was the proximate cause of her death. The attending physician, the principal witness who testified as to the cause of her death, crosses himself in some material particulars. Some part of his testimony is to the effect that the proximate cause of death was the diarrhœa or bowel trouble. This is contradicted by his own statement to the effect that the injuries were the cause, or proximately contributed thereto. There is evidence of some other witnesses of slight weight which tends to corroborate the opinion of the physician in his statement to the effect that death was caused by the bowel trouble or diarrhœa. As to how much of the testimony, or as to what part of it, of the physician, was entitled to credit, was a question to be passed upon and settled by the jury. We are not prepared to say that the verdict is without evidence to support it.

The third assignment of error complains of the court's definition of proximate and remote cause. As to proximate cause it is substantially the same as approved by the court in San Antonio & A. P. Ry. Co. v. Stevens, 11 Texas Ct. Rep., 399. There is no legal objection to the definition given to these terms by the trial court. If it was desired that they should be made plainer and more specific, a request to that effect should have been asked by special charge, which was not done.

There are several objections urged to the charge of the trial court, and some objections urged to the action of the court in refusing special instructions, which have been considered. The charge of the court, in connection with the special instructions that were given at the request of the appellant, in a proper way, substantially presented all the questions that were necessary to be passed upon.

What we have said as to the facts disposes of the tenth and eleventh assignments of error. The twelfth assignment of error is a general complaint as to the verdict being excessive. In view of the evidence, we are not prepared to say that the verdict was too large.

We find no error in the record, and the judgment is affirmed.

Affirmed.

Writ of error refused.

TEXARKANA & FORT SMITH RAILWAY COMPANY v. JANE FEUGIA ET AL.

Decided April 25, 1906.

1.—Peremptory Instruction.

An issue of negligence should never be withdrawn from the jury, except when there is no material conflict in the evidence and when different inferences can not be drawn from it.

2.—Intoxication—Negligence.

The question as to the effect of intoxicating liquors upon a man is ordinarily one of fact for the jury, and not for the courts. Ordinarily intoxication is simply evidence for the jury to consider in connection with all the attendant facts and circumstances in determining whether an act done by the party under such influence was negligence.

3.—"Look and Listen"—Presumption—Evidence.

It is not negligence *per se* for one to fail to look and listen before going on a railroad track. In the absence of any direct evidence upon the question, a jury would have the right to presume as a matter of fact that he did look and listen.

4.—Railroad Track—Use by Public.

If a portion of the roadbed of a railway has been commonly and habitually used for a long time by the public as a footpath, with the knowledge and acquiescence or by the permission of the company, it is considered as having licensed the public to use such portion of its roadbed for that purpose. So with regard to a crossing over its track.

5.—Violation of City Ordinances—Negligence.

The violation of city ordinances regulating the speed of locomotives within its corporate limits, and forbidding the running of locomotives at night without a headlight is negligence, and renders the guilty party liable for an injury proximately caused by such negligence.

6.—Habitual Use of Track—Duty to Look Out.

At such places as the public are accustomed to use a railroad track it is the duty of the railroad employes to keep a lookout.

7.—Precise Locality of Accident—Pleading.

The substance of the issue in this case being whether deceased was negligently killed within the limits of the city of Beaumont at a point on its road commonly used by the public with the knowledge and acquiescence of the railroad company, the court properly refused to confine the jury to any particular locality, the substance of an issue is all that need be proven.

8.—Charge May Assume a Fact as Proved Where not Controverted.

Where facts are uncontroverted they should not be submitted to the finding of the jury but should be assumed by the charge as established. A violation of the city ordinances by defendant having been proved, it was only necessary for plaintiff to prove that such negligence was the proximate cause of his injury, unmixed with contributory negligence on his own part.

9.—Measure of Damages—Loss of Society and Grief not Included.

Charge considered, and held not obnoxious to the objection that it permitted the jury to allow damages for loss of the society of the deceased nor for grief plaintiffs may have suffered. I. & G. N. Ry. Co. v. McVey, 87 S. W. Rep., 328, distinguished.

10.—Ordinances of City—Evidence.

Where the charter of a city provided "that the ordinances, resolutions and by-laws of the city council may be proved *prima facie* by a book of printed

ordinances of the city appearing to be printed by the authority of the city," a printed book of ordinances purporting on its title page to have been printed by authority of the city council of such city was properly admitted in evidence.

11.—City Limits—Testimony—Hearsay.

The testimony of a witness as to what a deceased officer of the city told him as to the locality of the city limits is hearsay and properly excluded.

12.—Same.

Testimony that the city did not exercise jurisdiction over a certain piece of property is not evidence that such property is not within the city limits.

13.—Attacking Veracity—Harmless Error.

When it does not appear what the testimony of the witness was, nor that it was material to appellant it can not be determined whether or not it was harmful error for the court to admit testimony attacking the reputation of such witness for truth and veracity.

Appeal from the District Court of Jefferson County. Tried below before Hon. L. B. Hightower, Jr.

Greers, Nall & Neblett, for appellant.—The court committed material and reversible error in failing to peremptorily instruct the jury to find for appellant railway company, because the evidence shows that the deceased was on the road without right and his position was not discovered in time to avoid injuring him, and that if appellant failed to ring its bell, burn its headlight on its engine and run its train not exceeding six miles an hour, such failure was not a violation of the duty due to the deceased and could not give appellees any cause of action. Texas & Pac. Ry. Co. v. Shoemaker, 84 S. W. Rep., 1049; St. Louis S. W. Ry. Co. v. Shiflet, 83 S. W. Rep., 677; Missouri Pac. Ry. v. Porter, 73 Texas, 304; Cardwell v. Gulf, B. & G. N. Ry., 13 Texas Ct. Rep., 458; Texas & Pac. Ry. v. Breadow, 90 Texas, 27; Texas & Pac. Ry. v. Staggs, 90 Texas, 460; Ft. Worth & D. C. Ry. v. Shetter, 94 Texas, 197; Missouri, K. & T. Ry. v. Haltom, 95 Texas, 113; Gulf, C. & S. F. Ry. v. Townsend, 82 S. W. Rep., 804; Kuehn v. Missouri, K. & T. Ry. Co., 32 S. W. Rep., 88; Texas C. Ry. v. Harbison, 12 Texas Ct. Rep., 382; St. Louis S. W. Ry. Co. v. Highnote, 12 Texas Ct. Rep., 843; Smith v. Fordyce, 18 S. W. Rep., 663; Missouri Pac. Ry. Co. v. Brown, 18 S. W. Rep., 670.

There being no evidence that the deceased Frugia was killed where the railroad of defendant intersects and crosses Fifth Street, the court committed reversible error in sending such issue to the jury. International & G. N. Ry. Co. v. Hill, 13 Texas Ct. Rep., 372; Cage v. Tucker, 5 Texas Ct. Rep., 535; Texas & Pac. Ry. Co. v. Wisenor, 66 Texas, 674; Houston & T. C. Ry. Co. v. Gilmore, 62 Texas, 391; St. Louis S. W. Ry. Co. v. Shiflet, 94 Texas, 141; Atchison, T. & S. F. Ry. Co. v. Click, 23 S. W. Rep., 833; Houston & T. C. Ry. Co. v. Tierney, 72 Texas, 312; Willis v. Whitsitt, 67 Texas, 676; Texas & P. Ry. Co. v. Hightower, 33 S. W. Rep., 541.

The verdict of the jury being contrary to the charge of the court and to the allegations of the plaintiff's petition as to the point where the deceased was killed and there being no allegation to support the verdict,

the court erred in not granting appellant's motion for new trial. Middlebrook v. Zapp, 73 Texas, 31; Texas & P. Ry. Co. v. Hightower, 33 S. W. Rep., 541; Moore v. Kennedy, 81 Texas, 147; Riverside Lumber Co. v. Lee, 7 Texas Civ. App., 525; Brinkley v. Harkins, 48 Texas, 226.

The charge of the court complained of is error for which the judgment should be reversed, because it does not exclude from the jury the idea that they could allow as pecuniary loss damages for loss of the society of the deceased, nor damages for grief plaintiffs may have suffered from the death of the deceased, and the jury is not by the charge restrained from allowing damages for such loss. International & G. N. Ry. Co. v. McVey, 12 Texas Ct. Rep., 993; Galveston, H. & S. A. Ry. Co. v. Worthy, 87 Texas, 459; Merchants' & Planters' Oil Co. v. Burns, 96 Texas, 573; Texas & Pac. Ry. Co. v. Lester, 75 Texas, 61; Galveston, H. & S. A. R. R. Co. v. Hughes, 22 Texas Civ. App., 134; International L. & P. Co. v. Maxwell, 65 S. W. Rep., 79; San Antonio Traction Co. v. White, 94 Texas, 468.

The court committed material and reversible error in admitting in evidence and permitting to be read what purports to be articles 379, 380 and 563 of the ordinances of Beaumont, because there is no proof of the execution, passage or publication of the ordinance under the authority of the city council of the city of Beaumont. International & G. N. Ry. Co. v. Hall, 9 Texas Ct. Rep., 917; City of Austin v. Walton, 68 Texas, 509; Brush Elec. Light and Power Co. v. LeFevre, 93 Texas, 607.

It being shown that W. A. Ives, who was former mayor and alderman of the city of Beaumont, who was secretary, and in whose custody the records of the city were, was dead, his statement made to the witness Potter as to the location of the southern boundary line of the city of Beaumont and that such line was at a point which would place the deceased entirely outside of the city at the time of his killing was admissible, and the court erred in excluding such statement. Tucker v. Smith, 68 Texas, 478; Russell v. Hunnicutt, 70 Texas, 660; Stroud v. Springfield, 28 Texas, 669; Welder v. Carroll, 29 Texas, 334; Cox v. State, 41 Texas, 5; Rosenburg v. Hayes, 85 Texas, 380.

The true location of the south line of the city of Beaumont being in doubt and uncertainty, and the north line of the gas plant being some five or six hundred feet north of the point where the deceased was killed, it was competent to show that the city was not exercising jurisdiction over the gas plant as a circumstance to show that the true south boundary line of the city was north of the point where the deceased was killed and the point of killing outside of the city. Gulf, C. & S. F. Ry. Co. v. Moody, 30 S. W. Rep., 574; Cook v. Carroll Land Co., 6 Texas Civ. App., 328; Weir v. Van Bibber, 34 Texas, 229.

Smith, Crawford & Sonfield, for appellees.—Deceased's intoxication is only a circumstance allowed to go to the jury, in order that it might be considered by them in determining whether or not he acted as an ordinarily prudent person would have acted under the same or similar circumstances. It is not enough that the injured person be intoxicated; but the jury must believe that that intoxication was in some way responsible for the injury—and this must be decided by the jury. Houston

& T. C. Ry. v. Reason, 61 Texas, 618; Missouri Pac. Ry. v. Martin, 2 Texas App. Civ. Cases, 572; Missouri Pac. Ry. v. Burnett, 3 Texas App. Civ. Cases, 288.

That appellant was guilty of negligence, as a matter of law: Frugia v. Texarkana & Ft. Smith Ry., 11 Texas Ct. Rep., 120 (this case on former appeal); Gulf, C. & S. F. Ry. v. Pendery, 36 S. W. Rep., 793; Gulf, C. & S. F. Ry. v. Matthews, 66 S. W. Rep., 591; Gulf, C. & S. F. Ry. v. Calvert, 32 S. W. Rep., 246.

That the deceased was rightfully upon the track: Frugia v. Railway, 11 Texas Ct. Rep., 120; Gulf, C. & S. F. Ry. v. Matthews, 13 Texas Ct. Rep., 244 (decided June, 1905, by Supreme Court); Washington v. Missouri, K. & T. Ry. Co. (supra), 90 Texas, 314; St. Louis & T. Ry. v. Crosnoe, 72 Texas, 79; Gulf, C. & S. F. Ry. Co. v. Matthews, 66 S. W. Rep., 591; Missouri, K. & T. Ry. v. Bellew, 54 S. W. Rep., 1079; Galveston, H. & S. A. Ry. v. Lewis, 25 S. W. Rep., 293; Gulf, C. & S. F. Ry. v. West, 36 S. W. Rep., 102; Texas & Pac. Ry. v. Barrett, 57 S. W. Rep., 602; Adams v. Southern Ry. Co., 84 Fed. Rep., 599; See note on "Implied License to Go Upon Railway Track," 13 Law Rep. Ann., 634.

In Gulf, C. & S. F. Ry. v. Matthews, 13 Texas Ct. Rep., 244, decided in June, 1905, after citing and reaffirming Washington v. Missouri, K. & T. Ry. Co., (supra).

That the deceased was not guilty of contributory negligence, as a matter of law: Gulf, C. & S. F. Ry. Co. v. Wagley, 40 S. W. Rep., 538; Galveston, H. & S. A. Ry. Co. v. Tirres, 8 Texas Ct. Rep., 529; Gulf, C. & S. F. Ry. Co. v. Creeland, 26 S. W. Rep., 153; International & G. N. Ry. Co. v. Eason, 35 S. W. Rep., 209; Gulf, C. & S. F. Ry. Co. v. Gascamp, 69 Texas, 547; Texas & Pac. Ry. Co. v. Wright, 62 Texas, 518; Texas & Pac. Ry. Co. v. Hill, 71 Texas, 451; Kansas & G. S. L. Ry. Co. v. Dorough, 72 Texas, 111; Dillingham v. Parker, 80 Texas, 573; Gulf, C. & S. F. Ry. Co. v. Pendry, 87 Texas, 553; Garteiser v. Galveston, H. & S. A. Ry. Co., 21 S. W. Rep., 632; San Antonio & A. P. Ry. Co. v. Long, 23 S. W. Rep., 499; Galveston, H. & S. A. Ry. Co. v. Briggs, 23 S. W. Rep., 503; Gulf, C. & S. F. Ry. Co. v. Dowman, 28 S. W. Rep., 923; Houston & T. C. Ry. Co. v. Gaither, 35 S. W. Rep., 179.

NEILL, Associate Justice.—This suit was brought by Jane Frugia for herself, as surviving wife, and for four minor children of Zeb Frugia, deceased, to recover damages alleged to have been sustained by them by reason of his death, which was alleged to have been caused by the negligence of the defendant in running a train through the city of Beaumont at a greater speed than six miles per hour and without ringing the engine bell, contrary to the ordinances of said city, which, by reason of such negligence, ran over and killed him while crossing its railway track. It was also alleged, as grounds of negligence, that defendant's servants operating said train through said city at night failed to have a headlight on its engine, and negligently failed to keep a lookout for persons on the track where deceased was killed, it being at a point commonly used by the public, with the knowledge and acquiescence of the company, in crossing its road.

The defendant answered by general and special exceptions, a general denial, contributory negligence, and that deceased was a trespasser upon its road and was not discovered in time to avoid injuring him.

The case was tried before a jury and the trial resulted in a judgment in favor of the plaintiffs for $5,000, which was apportioned among them as follows: To Mrs. Jane Frugia, $1,000; to Richard Frugia, $800; Thomas Frugia, $800; Day Frugia, $1,000, and to Clara Frugia, $1,400.

Conclusions of Fact.—The evidence in the record shows without dispute the following facts: (1) That on the night of the 18th of May, 1902, Zeb Frugia, in the corporate limits of the city of Beaumont, Texas, while riding horseback towards his home, rode on appellant's railroad track, at a place generally used by the public with the knowledge and acquiescence of appellant, and he and his horse were struck, run over and killed by one of appellant's engines drawing one of its trains. (2) That an ordinance of said city makes it unlawful for an engineer or other persons in charge of a locomotive or train to run the same within its corporate limits at a greater rate of speed than six miles an hour, and provides that any person violating the ordinance shall, upon conviction be fined not less than five nor more than one hundred dollars. Another ordinance of the city provides that any person who causes, permits or suffers any locomotive engine to run within the limits of the city at a greater rate of speed than six miles an hour, or who causes, permits or suffers any locomotive engine to run or move in the night time without having a headlight, or who shall cause, permit or suffer a locomotive engine or train to run at any time without causing the proper signals to be given, shall be fined not less than one nor more than one hundred dollars. (3) That Jane Furgia is the widow, and the other appellees the minor children of the deceased.

The evidence is reasonably sufficient to show the following additional facts: (1) That appellant's servants operating the engine negligently failed to keep a lookout for persons along the railroad track where the deceased was struck by its locomotive; (2) that it negligently permitted the engine which struck deceased to be run within the corporate limits of the city of Beaumont at a greater rate of speed than six miles an hour, and without a headlight; (3) that the concurrence of all or some of these acts of negligence was the proximate cause of Zeb Frugia's death; (4) that deceased was not a trespasser on appellant's track and was not guilty of negligence proximately contributing to his injury; and (5) that by reason of appellant's negligently causing the death of deceased, appellees, his surviving wife and children, sustained damages in the amount assessed by the jury.

Conclusions of Law.—1. The first assignment of error is directed against the action of the court in refusing to peremptorily instruct the jury at appellant's request to return a verdict for the defendant. Upon a prior trial such a peremptory instruction was given, and, on appeal, the judgment rendered upon a verdict returned in obedience to it was reversed and the cause remanded, for the purpose of having the jury try the issues made by the pleadings and evidence. See 82 S. W. Rep., 814; 11 Texas Ct. Rep., 120. An issue of negligence should never be

withdrawn from the jury, except where there is no material conflict in the evidence and where different inferences can not be drawn from it. (Bonn v. Galveston, H. & S. A. Ry., 82 S. W. Rep., 808, and authorities cited.) But wherever there is, from the evidence, room for reasonable differences of opinion, the judgment of the jury must be taken. (Drake v. San Antonio & A. P. Ry., 89 S. W. Rep., 407.)

The first proposition under this assignment is "that the evidence shows that deceased was guilty of negligence which proximately caused his death, in that, while intoxicated and under the influence of liquor, to such an extent as to render him incapable of exercising ordinary care for his protection, when his eyes were sore, the night dark and the wind blowing high, rendering it difficult to see or hear an approaching train, he rode a slow, clumsy and unwieldy horse immediately in front of a passing train not at a public crossing, and remained there until he was killed." If the evidence showed indisputably the facts grouped in this assignment, then it might be held that deceased was guilty of negligence as a matter of law. But they do not so appear. There was no evidence tending to show that deceased "rode a slow, clumsy and unwieldy horse," or that his "eyes were sore," or that he "remained in front of a passing train; that is, if the word "remained" is given its ordinary and generally accepted meaning. While the place where he rode upon the track was not a "public crossing" in its technical sense, it was a part of the track along which members of the public, with appellant's knowledge and implied consent, generally passed and crossed. There was evidence strongly tending to show that deceased was under the influence of intoxicating liquors to such an extent as to enable a witness to pronounce him "considerably organized." But it does not conclusively appear that he was so affected by liquor as would necessarily deprive him of the use of his faculties and senses and render his act in endeavoring to cross the track when and where he did, negligence *per se*. In other words, the evidence is not such as would require the question, by reason of his being under the influence of intoxicants, of his contributory negligence to be withdrawn from the jury, and a peremptory instruction of a verdict for the defendant.

Men have been getting drunk ever since Noah celebrated the subsidence of the flood. The ancient Germans, from whom the Anglo Saxon race sprung, used to propose their laws in their Legislature while drunk and consider their passage while sober. And it is suspected by some that their decendants propose laws in Legislatures of the present day while in the same condition, though their enactment may not be considered while sober, as by their ancestors. Intoxication affects different men in different ways. In some it quickens the intellectual faculties and sharpens the physical senses; and in some the first are for a time destroyed and the latter blunted—it largely depends upon the kind of man and liquor. The question as to the effect of intoxicating liquors upon a man is ordinarily one of fact for the jury and not for the courts. It can be said, however, that drunkenness never places one beyond the protection of the law, nor gives another the right to injure or kill him. Intoxication may be evidence of negligence of an act done by one while under its influence, and, in some cases, may be conclusive as to some acts alleged as negligence, but ordinarily it is simply evidence for the

jury to consider, in connection with all the facts and attendant circumstances, in determining whether an act done by the party while under such influence was negligence.

So the question really to be determined under this assignment is, can it be said as a matter of law that any man intoxicated to the degree deceased was, who, in a city whose ordinances prohibit an engine being run within its corporate limits at a greater rate of speed than six miles an hour, and at night without a headlight, when the wind is high, in endeavoring to cross a railroad track at a place where numbers of the public habitually cross with the knowledge and consent of the railway company, rides his horse upon the track and is struck and killed by the engine which is running at a speed of from fifteen to thirty miles an hour, is guilty of such contributory negligence as precludes his wife and children from maintaining an action against the company for negligently causing his death? If the man were sober, an affirmative answer could not be given this question; for it would certainly then be held in this State that the question is one of fact and not a matter of law. If he were sober, even if it were shown that he failed to look and listen before endeavoring to ride across, the defendant would be met with the proposition that it is not negligence *per se* for one to fail to look and listen before going on a railroad track. If it should be urged that a jury would have, in all probability, found it was negligence for him to fail to look and listen, it might be said in reply, in view of the testimony, that there is no evidence that he did not look and listen, for had he looked and listened he may not, on account of the engine being without a headlight, have seen the train, and, on account of the high wind and the train's running down grade with the steam off and without ringing the bell, not have heard it. Or he may have seen and heard it, and yet, relying upon it observing the ordinance, have known he would have ample time to ride across before a train running at a speed not exceeding six miles an hour could reach the point where he intended to cross. A jury, in the absence of any direct evidence upon the question, would have the right to presume as a matter of fact that he did look and listen; for so strong is this presumption of fact, that in jurisdictions where courts are not inhibited from charging upon the weight of the evidence in cases like this, the court may instruct the jury "that in the absence of evidence to the contrary it should be presumed that the deceased stopped, looked and listened." (Texas & P. Ry. v. Gentry, 163 U. S., 366, 41 Law Ed., 186-192.) In the case of Baltimore & P. Ry. v. Landrigan, 191 U. S., 462, 48 Law Ed., 262, 24 S. W. Rep., 137, the court said: "The presumption is founded on the law of nature. We know of no more universal instinct than that of self-preservation—none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming and death."

If the question under consideration would be one of fact if a sober man had been killed under the same circumstances, why should it not be in the case at bar? It can not be said that deceased was in such a condition that he could not and did not exercise his faculties and senses and instincts of self preservation before endeavoring to cross the track. See Gulf, C. & S. F. Ry. Co. v. Melville, 87 S. W. Rep., 865, and authorities cited.

Other propositions under the assignment are that the court erred in not giving the special charge instructing a verdict for the defendant, because the evidence shows that deceased was a trespasser upon the defendant's road, and defendant owed him no duty; that if defendant did fail to ring its bell, burn its headlight on its engine, and to run its train not exceeding six miles an hour, such failure was not a violation of any duty it owed deceased.

In Gulf, C. & S. F. Ry. Co. v. Matthews, 88 S. W. Rep., 192, 13 Texas Ct. Rep., 244, it is said by the Supreme Court in an opinion by Justice Brown, "It is well settled by the decisions of this court and by the decisions of courts of other States that if a portion of the roadbed of a railway has been commonly and habitually used for a long time by the public as a footpath, with the knowledge and acquiescence or by the permission of the company, it is considered as having licensed the public to use such portion of its roadbed for that purpose." It is then held that a person run over and killed by a train when using such portion of the defendant's roadbed was not a trespasser. The same principle obtains where there has been such long and continuous use of a portion of the roadbed of a railway company by the public as a crossing. From this it follows that deceased was not a trespasser.

The ordinance of the city prohibiting engines from being run within its corporate limits at a greater rate of speed than six miles an hour, and at night without a headlight were ordained for the protection of life and limb of all persons lawfully crossing the tracks of railroads within the limits of the city, whether at public crossings or at portions of the roads where the public habitually crossed with the knowledge and acquiescence of the company. (Houston, E. & W. T. Ry. v. Powell, 41 S. W. Rep., 695; Galveston, H. & H. Ry. v. Levy, 79 S. W. Rep., 879; Gulf, C. & S. F. Ry. v. Melville, 87 S. W. Rep., 865.) These ordinances were passed in the exercise of a police power vested in the city for the protection of the lives and property of persons within its limits, and a breach of the requirement of either is negligence, and renders the party liable for an injury proximately caused by such negligence. (Gulf, C. & S. F. Ry. v. Pendry, 36 S. W. Rep., 793; Missouri, K. & T. Ry. v. Matherly, 81 S. W. Rep., 589; Galveston, H. & S. A. Ry. v. Vollrath, 89 S. W. Rep., 283.) Besides, it is well settled that the servants of a railroad company operating its engines are bound to keep a lookout for persons using its track at a place where they are accustomed to use it. (St. Louis S. W. Ry. Co. v. Shiflet, 83 S. W. Rep., 677; Hutchens v. St. Louis S. W. Ry. Co., 29 S. W. Rep., 24; Missouri, K. & T. Ry. v. Matherly, 81 S. W. Rep., 589.

We conclude that the court did not err in refusing to peremptorily instruct a verdict for the defendant.

2. One has only to read plaintiff's petition in order that it may be demonstrated that the second, third and fourth assignments of error, which, in various forms, contend that plaintiffs' petition alleges that Frugia was killed at a point where Fifth Street intersects defendant's road, and, as the undisputed evidence shows that he was not killed there, but at a different point, the court should not have so charged the jury as to have allowed them to find a verdict for plaintiffs upon evidence which did not sustain but was contrary to such allegation in their peti-

tion, are not well taken. For the petition contains no such specific allegation and can not be construed to contain such an averment. Besides, the substance of an issue is all the law requires to be proven. The substance of the issue in this case is whether deceased was killed within the limits of the city of Beaumont, at a point on its road commonly used by members of the public with its knowledge and acquiescence, by being negligently run over by appellant's engine. El Paso Elect. Ry. v. Harry, 83 S. W. Rep., 737.

3. By the fifth assignment of error it is contended that the court erred in paragraph 6a of its charge to the jury, in that it submitted as an issue whether the place where deceased was killed was habitually used by the public as a place of crossing on horse-back and in vehicles with the knowledge and consent of the defendant, when there was no evidence in the record to raise such question. We deed it unnecessary to recite the evidence; for it is sufficient to say that from reading it we conclude that it established the affirmative of such issue, and so recorded it in our conclusions of fact.

4. The seventh paragraph of the court's charge is as follows: "You are instructed, that under the law, if the said accident occurred within the city limits of the city of Beaumont as alleged by plaintiff, and defendant's train within said city limits at said time was being run at a greater rate of speed than six miles per hour, and if said train was being run without a headlight on the engine, or without its bell being rung, and either of or all of said acts or omissions, if any, was or were the direct and proximate cause of the death of the said deceased, then in that event the defendant was guilty of negligence.

"But in this connection you are instructed that although you may believe from the evidence that the defendant was guilty of negligence for the reason that said train at the time was running in excess of six miles per hour within the city limits of the city of Beaumont, if you find that it was so running within said city limts; or that defendant was guilty of negligence because the bell on said engine was not being rung at said time, or that defendant was guilty of negligence in that there was no headlight on the engine at said time and place, if there was not, still you are instructed that the plaintiff would not be entitled to recover unless such negligence was the direct and proximate cause of the death of deceased, without contributory negligence on his part, or if you find that deceased was a trespasser upon the defendant's track at said time and place, then plaintiff can not recover however negligent defendant or its employes were at the time." This is complained of as being upon the weight of evidence. The uncontroverted evidence shows valid ordinances of the city of Beaumont prohibiting engines and trains being run within the city limits at a greater rate of speed than six miles an hour, or a train being run within the city limits at night without a headlight on its engine. It also is indisputably shown that the accident occurred at night. It is well settled that where facts are uncontroverted they should not be submitted to the finding of the jury, but should be assumed by the charge as established. The violation of the statute or ordinance regulating the speed of trains, or requiring signals or warnings of approach to be given is negligence as a matter of law, and, when proven by one who bases his cause of action for an injury in consequence of

such violation, it is then only necessary for him to prove that such negligence was the proximate cause of his injury to entitle him to recover, provided it is not shown that he was guilty of contributory negligence. (San Antonio & A. P. Ry. Co. v. Bowles, 88 Texas, 635; Texas & P. Ry. v. Brown, 33 S. W. Rep., 148; Gulf, C. & S. F. Ry. Co. v. Calvert, 32 S. W. Rep., 248; Missouri, K. & T. Ry. v. Matherly, 81 S. W. Rep., 589; Shearman & Redf., Neg., sec. 13.) The charge leaves it to the jury to determine whether the ordinances or any of them were violated: and if it should be found that they were, then declares the legal effect of such violation, and requires the jury then to find whether such violation was the proximate cause of Frugia's death, and, if it were, whether contributed to by deceased. The assignment is overruled.

4. The ninth paragraph of the charge, which is complained of in the seventh assignment of error, is an application of the principles of law enunciated in the sixth to the case, and is not obnoxious to the objections urged.

5. The eighth assignment of error complains of the tenth paragraph of the charge, which declares the measure of damages, as follows: "If in the event you find for plaintiff under the instructions herein given you, you will assess the damages for such a sum of money as if paid now would fairly compensate the plaintiff and said minor children for the pecuniary loss, if any, sustained by reason of the death of the said Zeb Frugia," then follows a form of the verdict.

It is urged against this part of the charge that "it does not exclude from the jury the idea that they could allow as pecuniary loss damages for loss of the *society of the deceased,* nor damages for *grief* plaintiffs may have suffered from the death of deceased, and the jury is not by the charge restrained from allowing damages for such loss." The charge is not subject to the objection; for it logically excludes everything except compensation for pecuniary loss, and can by no principle of construction be held to include loss of society of the deceased or grief plaintiffs may have suffered from his death. What is not comprehended, expressly or implied, in a proposition is logically excluded. The error in the McVey case was that, after the charge had stated correctly the measure of damages, it expressly excluded an improper element of damages without expressly excluding other elements of the same character. And it was thought that, inasmuch as some improper elements were expressly excluded, it might be taken to include other elements of the same nature.

6. The assignments of error from the ninth to the fourteenth, inclusive, which complain of the court's charge have been considered, and we have reached the conclusion that none of them is well taken. We deem it unnecessary to discuss them, for the principles of law enunciated by the charge are too well established to require discussion or citation of authorities. That such principles are applicable to the case is apparent to any one familiar with the law and acquainted with the facts in the record.

7. The substance of such special charges as were requested by appellant and refused by the court as is the law and applicable to the case is contained in the court's general charge. Therefore, we overrule the

fifteenth, sixteenth, seventeenth, eighteenth and twenty-first assignments of error.

8. The nineteenth assignment of error complains of the court's permitting the plaintiffs to read in evidence the ordinances of the city of Beaumont regulating the speed of engines and trains, ringing bells and maintaining headlights at night on engines while being operated within the city limits, the objection being that there was no proof of the execution, passage or publication of such ordinances by and under the authority of the city council.

The ordinances were read in evidence from a book in which they were printed, upon which book is endorsed, "Charter and Ordinances of the City of Beaumont, Texas." On the title page of the book is printed, "The Charter and Ordinances of the City of Beaumont, comprising all of the civil and criminal ordinances in force and effect for the city of Beaumont, May, 1899, revised and compiled by William L. Thompson and D. P. Wheat, Beaumont, Texas; published December, 1899, by the authority of the council of the city of Beaumont."

Section 34 of the charter of the city of Beaumont, enacted by the Twenty-sixth Legislature on the 13th of May, 1899, provides that "in all judicial proceedings it shall be sufficient to plead an ordinance of the city by caption without embodying the entire ordinance in the pleading, and all printed ordinances or codes of ordinances shall be admitted in evidence in any suit, and shall have the same force and effect as the original ordinances."

Section 82 of the charter is: "That the ordinances, resolutions and by-laws of the city council may be proved *prima facie* by a book of printed ordinances of the city, appearing to be printed by the authority of the City or by copies of ordinances certified by the city secretary to be true copies of such ordinances or by the recorder thereof."

Other provisions of the charter empower the city council to enact ordinances "to regulate the speed of engines and locomotives within the city to prohibit and regulate the ringing of bells and blowing of whistles of railroad engines and locomotives within the city limits; to establish . . . by-laws and ordinances . . . for the maintenance of the peace and tranquility of said city, as well as for the protection of the persons and property of its inhabitants, and to enact and ordain any and all ordinances, not repugnant to the Constitution and laws of the State."

From this it appears that the ordinances in question were introduced in evidence under the express provisions of the city charter by which the Legislature delegated to the council the power and authority to enact them. More need not be said in disposing of this assignment. This also disposes of the twentieth assignment of error.

9. The testimony of the witness Potter, which appellant claims in the twenty-second assignment the court erred in not allowing introduced in evidence, was hearsay pure and simple and inadmissible for that reason.

10. Testimony that the city of Beaumont did not exercise jurisdiction over a gas plant was not evidence tending to show that the place where deceased was killed, though the plant was six hundred feet north of there, was not within the limits of the city. It might as well be contended that because the State of Texas has never exercised juris-

diction over a part of her territory that such territory is not within the boundaries of the State, as to contend that because a city does not exercise jurisdiction over a piece of property that such property is not within the city limits. Therefore, we overrule the twenty-third assignment of error.

11. It does not appear from the statements subjoined to the propositions under the twenty-fourth assignment of error that the testimony of the witness Harry Adams (his testimony not being shown) was material to any issue in the case or would have been of any advantage to defendant had such witness's reputation for truth and veracity remained unchallenged. Therefore, it can not be said that the appellant was prejudiced by the testimony of Clarence Leonard, complained of in the twenty-fourth assignment of error, by which it was sought to impeach the reputation of Adams, even though it should appear that the court erred in admitting Leonard's testimony. A court will not reverse a judgment for reason of a harmless error. This disposes of the twenty-fifth assignment of error as well.

12. The assignments of error from the twenty-sixth to the forty-fifth inclusive, which complain, upon various grounds, of the court's overruling defendant's motion for a new trial are all overruled, because all questions presented by them have been considered and disposed of in passing upon the preceding assignments. The judgment of the District Court is affirmed.

Affirmed.

Writ of error refused.

T. L. TAYLOR ET AL. v. D. W. DOOM ET AL.

Decided April 25, 1906.

1.—Revised Statutes, Art. 1357, Construed—Mistake in Judgment.

Under the provisions of the statute, a mistake or miscalculation in a judgment can be corrected at any time on application of either party after notice to the opposite party.

2.—Execution—Not Necessary that Judgment Provide for Issuance of.

It is not essentially necessary to the issuance of an execution that it be provided for in the judgment, and an execution can be issued under a judgment, although not provided for therein.

3.—Dormant Judgment—Sale Under.

A sale under a dormant judgment is only voidable, and can not be attacked in a collateral proceeding.

4.—Limitation—Evidence of Occupancy.

Evidence of occupancy considered and held too indefinite to establish title by limitation.

5.—Agreement as to Common Source of Title—Effect of.

In trespass to try title, an agreement that the father is the common source of title does not preclude the children from showing that the land was community property, and claiming through their mother.

6.—Purchaser of Legal Title at Execution Sale—Equities—Burden of Proving.

The purchaser of land at a legal and regular execution sale under judgment against the holder of the legal title, becomes vested with the legal title,

and the holder of an equity must prove that such purchaser was not a purchaser for value without notice.

Appeal from the District Court of Jasper County. Tried below before Hon. W. B. Powell.

W. W. Blake, for appellants.—The court erred in admitting in evidence a judgment of the District Court of Jasper County, Texas, rendered October 8, 1868, in cause No. 437, styled Bernart Weil v. Wm. Taylor, introduced by plaintiffs to support their title to the land in controversy, because the same purports to be a reformation of former judgment, rendered eighteen months prior, and after the court had lost jurisdiction of the matters in controversy, and adjudicated in said former judgment, and after a final and valid judicial determination of the same.

Because this judgment, in addition to an attempt to revise and reform a former valid judgment, purports also to be a revival of former judgment, and did not award or authorize an execution by virtue of which the land was sold, and was itself long dormant when execution issued on it and the same was void as a judgment for debt. Rev. Stats., arts. 1337, 2326a, 2338; Missouri P. Ry. Co. v. Haynes, 82 Texas, 448; Brewster v. Norfleet, 22 S. W. Rep., 226; Brownsville v. Basse, 43 Texas, 448; Rogers v. East Line Lumber Co., 11 Texas Civ. App., 110; Hedgecove v. Conner, 43 S. W. Rep., 322; McConkey v. Henderson, 24 Texas, 212; Stegal v. Huff, 54 Texas, 196; Northcraft v. Oliver, 74 Texas, 162.

If this judgment of October 8, 1868, ever had any force or effect for any purpose it was a judgment reviving the judgment of April 9, 1867. It is not an original suit but a continuation of the former one and would not support an execution. Bullock v. Ballew, 9 Texas, 498; Perkins v. Hume, 10 Texas, 50; Hopkins v. Howard, 12 Texas, 8; Bridges v. Samuelson, 73 Texas, 523; Fitzgerald v. Evans et al., 53 Texas, 461; Burns v. Skelton, 68 S. W. Rep., 527; Brown v. Harley, 2 Fla., 159; Owens v. Henry, 161 U. S., 642; Am. & Eng. Ency. Law, 1st ed., vol. 21, p. 870 top.

The court erred in admitting in evidence an entry on the execution docket of Jasper County, of the sheriff's return on the execution issued on the judgment of October 8, 1868, showing levy and sale of land in controversy by the sheriff to M. C. Moulton and D. W. Doom, because the said execution and sale thereunder was void, as being without authority of any court, and no valid judgment to support it. Because the officer fails to state definitely the authority under which he acted. The return fails to correctly style or number the cause in which the execution issued. Underwood v. Brown, 68 S. W. Rep., 206; Allison v. Brookshire, 38 Texas, 202; House v. Robertson, 89 Texas, 687.

One in the exclusive adverse possession of a tract of land for more than ten years claiming under a memorandum defining the boundaries, cultivating, using and enjoying the land, will hold to the limits described in the memorandum under which he claims. The actual visible notorious adverse possession of a small part of the land so occupied will carry with it constructive possession of the whole, unless such constructive possession is in some way broken by the possession of a portion of it by an adverse claimant. Pendleton v. McMains, 75 S. W. Rep., 349; Nativel v. Raymond et al., 59 S. W. Rep., 313; Porter v. Miller et ux, 76 Texas,

597; Price v. Eardley, 8 Texas Ct. Rep., 787; Pearson v. Boyd, 62 Texas, 544; Angell on Lim. (6th ed.), p. 410-412.

Where land of a defendant is seized and sold and the defendant in execution refuses to recognize said sale, but openly claims title in himself, and is not ousted by the purchaser, but is allowed to retain adverse possession for ten years, openly cultivating, using and enjoying the same, he is reinvested of title to the same land, and his deed from his vendor will serve to limit his boundaries. Hunter v. Hubbard, 26 Texas, 547; Southall v. Southall, 6 Texas Civ. App., 696; Angell on Limitations, sec. 174-178, sec. 472, 6th ed.; Chalfin v. Malone, 9 B. Mon. (Ky.), 496; Keaton v. Thomasson, 2 Swan. (Tenn.), 138; Burhans v. Van Zandt, 7 Barb. (N. Y.), 91; Kent v. Harcourt, 33 Barb. (N. Y.), 491; Cyc., vol. 1, p. 1040, note 8; p. 1041, notes 9 and 10, and p. 1055, notes 2 and 3; Cyc. Annual Annotations, p. 86, note 2; Milnes v. Van Gilder, 197 Pa., 347; Waldron v. Harvey, 54 W. Va., 608.

The court erred in his third conclusion of law (numbered 9), that the admission of common source of title in their ancestor estopped them from claiming the community interest of their deceased mother, who died before the sheriff's sale, seized of one-half the land in controversy.

The court erred in his fourth conclusion of law (numbered 10) that the burden was on defendant to prove notice to plaintiff of the community interest of their mother, because their title by descent is a legal title. Keys v. Mason, 44 Texas, 141; Stephens v. Hix, 38 Texas, 658; Edrington v. Butler, 33 S. W. Rep., 144.

D. W. Doom and *H. C. Howell,* for appellees.—That a dormant judgment can be revived at any time within ten years after its rendition, and a judgment can be amended after the expiration of the term at which it was rendered on notice to the party to be affected thereby, cited: Rev. Stats., 3361, 1356, 1357; Coffee v. Block, 50 Texas, 118; De Hymel v. Scottish-American Mortgage Co., 80 Texas, 495; Cowan v. Ross, 28 Texas, 228; Hickey v. Behrens, 75 Texas, 495; Russell v. Miller, 40 Texas, 495; Patton v. Collier, 90 Texas, 120.

A sale of land under an execution issued on a dormant judgment is not void and does not render such sale subject to collateral attack. Boggess v. Howard, 40 Texas, 158; Maverick v. Flores, 71 Texas, 110; Smith v. Perkins, 81 Texas, 152; Odum v. Menafee, 11 Texas Civ. App., 119; Meader v. Aringdale, 58 Texas, 450.

Where an original judgment was rendered for a specific sum as principal, and there was a failure on the part of the clerk to calculate the interest due on such principal sum, and subsequently a judgment was rendered in the same court between the same parties amending and reviving such original judgment, which was dormant, and directing the clerk to calculate the interest on such principal sum and include it in the judgment of revivor, which was accordingly done, it was immaterial that there was a failure to bring forward such principal sum and incorporate it in the judgment of revivor, as the same could be ascertained by reference to the former judgment, and an execution for the principal sum and the interest, or for either, or for any part thereof, which referred to the judgment of revivor as authority for its issuance was proper, and even if irregular, it was not such irregularity as the execution

debtor or his heirs could avail themselves of on collateral attack. Rev. Stats., art. 1356, 1357; Roberts v. Connellee, 71 Texas, 17, 18; Bludworth v. Poole, 21 Texas Civ. App., 551; Camp v. Gainer, 8 Texas, 372; Waller v. Huff, 9 Texas, 530; Taylor v. Harris, 21 Texas, 439; Fitzgerald v. Evans, 53 Texas, 461; Smith v. Chenault, 48 Texas, 455; Little v. Birdwell, 27 Texas, 689; Taylor v. Branham, 35 Fla., 297.

A judgment, execution and sheriff's sale can be collaterally attacked only when the court rendering the judgment was without jurisdiction of the person or subject matter of the suit, and where the court has such jurisdiction neither such judgment, execution or sale can be collaterally attacked so as to affect the rights of a purchaser thereunder, although such proceedings may be irregular or erroneous. Trueheart v. McMichael, 46 Texas, 227; Williams v. Ball, 52 Texas, 606 et seq; Treadway v. Eastburn, 57 Texas, 209; Odle v. Frost, 59 Texas, 686; Thorn v. Newsom, 64 Texas, 165; Martin v. Robinson, 67 Texas, 374; Reems v. Masterson, 80 Texas, 52; Ross v. Drouilhet, 9 Texas Ct. Rep., 81; Bordages v. Higgins, 1 Texas Civ. App., 50; Newman v. Mackay, 11 Texas Ct. Rep., 353; Hartford Fire Ins. Co. v. King, 7 Texas Ct. Rep., 183.

Where land is levied on and sold under valid judgment, execution and sale, it breaks the connection of the execution debtor with the sovereignty of the soil, and vests such title in the purchaser as the debtor had at the time of the levy and sale, however such title may have been acquired or held by him, and in case of reentry by him or his heirs thereafter, they do so as naked trespassers or disseizors without title or color of title. Wright v. Daily, 26 Texas, 731; Harris v. Hardeman, 27 Texas, 249; Long v. Brenneman, 59 Texas, 210; Spring v. Eisenach, 51 Texas, 435; Paxton v. Meyer, 67 Texas, 96; Voight v. Mackle, 71 Texas, 78; Blum v. Rogers, 71 Texas, 668; Bailey v. Laws, 3 Texas Civ. App., 535; Daugherty v. Yates, 13 Texas Civ. App., 650; Doom v. Taylor, 9 Texas Ct. Rep., 631.

Where plaintiffs establish a prima facie title to the land in controversy, and defendants, being naked trespassers or disseizors, fail to show adverse occupancy of any part of the tract under conditions and circumstances such as to fully meet the requirements of the statute, and such as to enable the court to render a judgment in their favor for a specific and definite part thereof, a judgment in favor of plaintiffs for the entire tract sued for is the only judgment that can be legally rendered. Giddings v. Fischer, 8 Texas Ct. Rep., 623; Titel v. Garland, 13 Texas Ct. Rep., 335.

Where plaintiffs became the purchasers for value of the legal title to the tract of land in controversy by sheriff's sale, and without notice of the existence of an equitable title in the heirs of the deceased wife of the execution debtor arising out of her community interest in the land, plaintiffs are bona fide purchasers, and will be protected as such, and where such equitable title is asserted by defendants, the heirs of such deceased wife, the burden is upon them to show affirmatively that plaintiffs, at the time of their purchase, had notice either actual or constructive of such title, and is not upon plaintiffs to show negatively that they did not have such notice. Rev. Stats., art. 2378; Hill v. Moore, 62 Texas, 615; Wren v. Peel, 64 Texas, 380; Pouncey v. May, 76 Texas, 565;

Patty v. Middleton, 82 Texas, 586; Saunders v. Isbell, 5 Texas Civ. App., 513.

FLY, ASSOCIATE JUSTICE.—This is an action of trespass to try title to 225 acres of land, instituted by appellees against appellants. Appellants answered by pleas of not guilty and limitation. The cause was tried by the court and resulted in a judgment in favor of appellees.

It was agreed that William Taylor was the common source. Appellees claimed the land through an execution sale made by virtue of a judgment in a case styled B. Weil v. Wm. Taylor, and appellants claimed the land as the heirs of William Taylor and their mother. The land was the community property of William Taylor and his first wife. While it is inferentially found by the court that appellant were the heirs of the first wife of William Taylor there is no proof of any but Z. W. Taylor being her heir. It appears from the statement of facts that it was admitted by both parties that William Taylor is the common source of title, and that appellants are the heirs and legal representatives of said William Taylor. We find that the title to the land was in appellees. Other facts are found in connection with the discussion of the assignments of error.

It appears that B. Weil obtained a judgment, on April 9, 1867, against William Taylor for $588.58, and costs, and that it became dormant by failure to issue execution within a year from its date. Suit was then brought by the plaintiff to revive the judgment and to correct the former judgment in a matter of interest and a judgment was obtained to that effect. The last judgment recited that the former one had been obtained, that it was rendered for an insufficient amount and that it had become dormant, and it revived the judgment and corrected the same. Under these circumstances, the cause being tried by the court, it does not appear how appellant could have been prejudiced by the admission in evidence of the first judgment. The recitals in the second judgment contained everything of importance in the first one.

If it should be held that the judgment of October 8, 1868, was void insofar as it sought to increase the amount of the former judgment, that would not invalidate that portion of it which revived the former judgment. The one part is separable from the other. But clearly under the provisions of article 1357, Revised Statutes, the mistake or miscalculation could be corrected at any time on application of either party, after the opposite party had been given notice of the application for such amendment. (Russell v. Miller, 40 Texas, 494; Chestnut v. Pollard, 77 Texas, 86.) The error was one that could be corrected from the record itself, and was a case peculiarly within the purview of the statute. It was a clerical error in the calculation of interest that was corrected. (Missouri Pac. Ry. v. Haynes, 82 Texas, 448; Whittaker v. Gee, 63 Texas, 435.) But as before stated if the attempt to amend was ineffectual, the revival of the former judgment was not affected thereby.

The original execution, under which the land in controversy was sold, was destroyed by fire and the court admitted in evidence an entry on the execution docket of the district and county clerk of Jasper County. That entry showed that the execution was issued October 3, 1872, for debt and costs, $514.21, and was returnable to November term, 1872.

There was also an entry of the sheriff's return showing that the execution had been levied on the land in controversy, that the proper advertisement had been made and that on the first Tuesday in November, 1872, the property had been sold to appellees for the sum of $135. This was followed by a statement of how the money was applied by the sheriff. Appellant objected to the entries because the execution and sale were void, as being without the authority of any court, because the return fails to correctly number or style the cause in which the execution was issued and because it was vague and uncertain. There is no merit whatever in these objections. The style of the case was given and it was sufficiently identified. No variance is shown by reason of the amount for which execution was issued being larger than the original amount of the judgment. It would very naturally be larger in 1872 than it was in 1868, as it had been bearing interest all the time.

It seems to be a contention that the execution having been issued by virtue of the judgment of 1868, and that judgment not authorizing an execution except under the judgment of 1867, the execution was necessarily void. The last judgment recited the amount of the first judgment, stated that there had been a miscalculation of the interest and then gave the correct amount of interest and additional costs, revived the former judgment and awarded executed "thereupon." It is not essentially necessary to the issuance of an execution that it be provided for in the judgment, and an execution could have been issued under the judgment of 1868 although it was not provided for therein. (Freeman, Judg., sec. 2; Roberts v. Connellee, 71 Texas, 11; Hartz v. Hausser, 14 Texas Ct. Rep., 141.)

It does not appear that any execution had been issued under the judgment until 1872, and if that be true, the judgment was dormant. However, a sale under a dormant judgment is not void but only voidable, and can only be attacked in a direct proceeding instituted for that purpose. It can not be attacked in a collateral proceeding. (Sydnor v. Roberts, 13 Texas, 598; Hancock v. Metz, 15 Texas, 205; Hawley v. Bullock, 29 Texas, 217; Boggess v. Howard, 40 Texas, 153; Laughter v. Seela, 59 Texas, 177; Maverick v. Flores, 71 Texas, 110.)

The evidence as to occupancy of any part of the land in controversy is too vague and uncertain to support a plea of limitations. It is not shown whether the parties who at different times occupied the house did so as tenants of appellants or not. Z. W. Taylor swore that a part of the old William Taylor farm which had been in cultivation for 30 or 35 years, was on the land in controversy, but the nearest he could come to fixing the number of acres was from 10 to 40 acres. He then swore that he did not know where the line of the land in controversy was, clearly showing that he knew nothing about whether any of the 225 acres in controversy was in the farm or not. He said the house was near a line made by Mr. Blake. The latter testified that he was a surveyor but did not find the line between the land in controversy and the 490 acres belonging to appellants. Evidently he knows nothing about the location of the line and yet from his calculations he testified that the house of W. D. Taylor was about twenty feet from the line. Z. W. Taylor also swore that he, as agent for Mrs. Trotti and Mrs. Jones, had, four or five years ago, sold some oak timber off the land in

suit. The foregoing is substantially what was sworn in support of the pleas of limitation. It is clearly insufficient to establish title by limitations. The house of W. D. Taylor, spoken of by the witness Blake, was built less than ten years prior to the institution of this suit.

We can not agree with the trial judge in his ruling that appellants were precluded from showing that the land was the community property of their father and mother, on the ground that they were estopped from claiming through their mother by reason of their agreement that their father was the common source. The rule is well established that when an agreement is made as to a common source the defendant can not question the validity of any link in the chain of title between the common source and the sovereignty of the soil. (Pearson v. Flanagan, 52 Texas, 266; Glover v. Thomas, 75 Texas, 506; Evans v. Foster, 79 Texas, 48.) But it does not seem to us that it is an infringement of that rule to hold that appellants were authorized to show that though the legal title was in William Taylor, their father, that their mother had an equitable title to one-half of it. There was no attack upon the title of William Taylor, nor on any link between that title and the State. Appellants did not attempt to attack that title, they admitted it, but they had the right to show that although the legal title was in William Taylor, that it was community estate and one-half of the land belonged to his wife. As said in the case of Fox v. Brady, 1 Texas Civ. App., 590, "We can not perceive how the claim by appellees under this deed as a common source could be construed to be inconsistent with their claim that the property conveyed was community property." It is held that the question of common source is one of burden of proof, a rule of evidence and not of estoppel. (Howard v. Masterson, 77 Texas, 41; Rice v. St. Louis, A. & T. Ry., 87 Texas, 90.)

In the case last cited the court in discussing this question said: "Notwithstanding the proof of the insufficiency of his title under the common source, the defendant may still defeat the action by showing that there is a title superior to that of the person or persons under whom both claim, and that he is holder of that title; and even without showing that he holds such superior title, it may be that his defense ought to prevail, provided he prove affirmatively not merely that someone had the title anterior to that of common source, but also that such previous title never vested in the common source. . . . Since the plaintiff must prove his title in order to recover, it would seem that when he has shown title under the common source, that proof by defendant, however made, that the common grantor had no title ought to be a defense."

The trial court also held that the burden rested upon appellants to show that appellees were not purchasers for value without notice of their equitable title to their mother's community interest in the land and that having failed to make that proof appellees should recover, upon their proof of having purchased the legal title to the land at execution sale. The ruling was correct, for when appellees showed that they had bought the land at a regular and legal execution sale under a judgment against William Taylor, they had made out a *prima facie* case and it

then devolved upon appellants to prove the superiority of their title. (Simmons Hardware Co. v. Davis, 87 Texas, 146.)

William Taylor had the legal title to the land in him, and his wife only had an equity of one-half of the land. When the sale under execution took place the legal title to the whole of the land passed to appellees, and in order for appellants, the holders of the equities of the wife, to recover it devolved upon them to prove their equities. To do that it was necessary not only to prove that their mother was the owner of one-half of the land but that appellees were not purchasers for value without notice. McAlpine v. Burnett, 23 Texas, 650; Baldwin v. Root, 90 Texas, 546; Turner v. Cochran, 94 Texas, 480; Kimball v. Houston Oil Co., by this court not yet published.

The reason for the rule is thus given in McAlpine v. Burnett: "The principle is manifest, upon the mere statement of the proposition, for every complete legal title, *prima facie*, carries with it, and covers the equitable title. In any case it does not so include it, in fact, the party claiming the equitable title must aver and prove it." The rule is the same as prevails in the case of a junior purchaser, who must assume the burden of proof, because the legal title is in the prior purchaser. In this case the equitable title was neither averred or proved.

Affirmed.

R. W. GETZENDANER v. TRINITY AND BRAZOS VALLEY RAILWAY COMPANY.

Decided April 27, 1907.

1.—Condemnation Proceeding—Mistake in Award and Judgment—Correction.

In a proceeding to condemn two tracts of land for railroad purposes, by mistake only one of said tracts was described in the petition, which fact was unknown to any of the parties and the proceeding was conducted in all respects as for the condemnation of the two tracts; the award referred to the petition for description of the land condemned; the judgment was written accordingly; the defendant discovered the mistake, but remained silent and accepted the entire amount of the award, and thereafter denied the right of the railroad company to appropriate and use the tract omitted from the petition and judgment. Held, that a court of equity will correct the mistake and make the award and judgment show what they were in fact intended to show.

2.—Same—Eminent Domain—Compensation.

The conditional paramount right of the State to take private property for public use becomes absolute when compensation has been assessed or agreed upon in any manner, and is paid.

Appeal from the County Court of Ellis County. Tried below before Hon. F. L. Hawkins.

Templeton & Harding, for appellant.—The record in a cause can not be amended or corrected at a subsequent term except by reference to some entry upon the docket or memorandum found among the files. Missouri Pac. v. Haynes, 82 Texas, 456.

A party can not have a judgment corrected or amended at a subsequent

term of the court when the mistake was caused by his own negligence. Brownson v. Reynolds, 77 Texas, 254.

The mistake in the judgment in the condemnation suit being a judicial and not a clerical error, the judgment could not, at a subsequent term, be amended, but the remedy of appellee was by an original suit to reopen the case and dispose of the litigation on its merits, showing good excuse for the necessity of said action. Eddleman v. McGlathery, 74 Texas, 280.

The petition showing that the award became the judgment of the County Court at a regular term, and failing to show but that appellee discovered the mistake before the adjournment of the term, or why it did not move for a new trial or appeal, no cause of action was shown. Bomar v. Parker, 68 Texas, 440; Morgan v. Davenport, 60 Texas, 230; Spencer v. Kinnard, 12 Texas, 180; Vardeman v. Edwards, 21 Texas, 740; McGloin v. McGloin, 70 Texas, 636.

The petition not being verified by affidavit was subject to the general demurrer. Holliday v. Holliday, 72 Texas, 581.

Neither a court of law or equity will grant relief to a party to a judgment except upon a strict showing that a mistake from which the relief is asked did not result from the fault or negligence of himself or his counsel in the conduct and management of the original suit. Bomar v. Parker, 68 Texas, 440; Brownson v. Reynolds, 77 Texas, 254; Johnson v. Templeton, 60 Texas, 238; Bryorly v. Clark, 48 Texas, 345; Sayles' Texas Civil Practice (3d ed.), vol. 1, chap. 44, secs. 686-7-8, on subject "Bill for New Trial."

The record in the condemnation suit was regular in form and no error or mistake was apparent on such record and the court was powerless to alter, amend and enlarge the judgment after the close of the term, upon parol testimony showing a judicial error in the judgment of condemnation. Nicklin v. Robertson, 28 Oregon, 278; Rev. Stats., art. 1356; Missouri Pac. Ry. v. Haynes, 82 Texas, 448.

Andrews, Ball & Streetman and *Groce & Eskridge,* for appellee.

BOOKHOUT, ASSOCIATE JUSTICE.—The judgment appealed from in this case is based upon a petition filed by appellee as plaintiff below, on August 23, 1906, the material allegations of which were, upon the trial, found to be true, and the assignments in this court do not question the sufficiency of the evidence to sustain such finding.

The facts alleged are, in substance, that in 1906 appellee, a duly incorporated railway company, was engaged in constructing a line of railway in Ellis County, Texas, and needed, for this purpose, two tracts of land 7 60-100 and 10 63-100 acres respectively, in said county, and belonging apparently to appellant and others, field notes being set out, and was under the necessity of prosecuting condemnation proceedings to acquire such land, and undertook to institute and prosecute such proceedings. That through some mistake, field notes of only one of the desired tracts of land were furnished the attorney who drew the petition for condemnation, and such attorney not being conversant with all the facts, inserted in the petition only the field notes furnished him, omitting those of the desired 10 63-100 acre tract entirely. That upon the peti-

tion so drawn commissioners were duly appointed, who subsequently met, organized and proceeded to hear and determine the matters submitted to them. That at the hearing appellee was represented by counsel and appellant was present both in person and by counsel, and the other parties defendant having disclaimed, the hearing proceeded, without the petition having been read, and upon the belief and assumption of all parties, including the commissioners, that the hearing was for the determination of the matter of all damages to be suffered by reason of the condemnation for railway purposes of both said tracts of land. That evidence in respect to such damages as to both of said tracts, was submitted to and was considered by, the commissioners who, after due consideration, made their award to appellant of $925 for the damage to him by reason of the condemnation of both of said tracts of land, but believing both to be described in the petition for condemnation, in the written award made, the petition was referred to for description of the land in question, the intent, however, of the commissioners being that the sum awarded should cover the damages resulting from the condemnation and appropriation of both of said tracts of land.

It was further alleged, in substance, that the award above mentioned was filed with the county judge on May 7, 1906, and being satisfied with the same, and believing that both the tracts of land concerning which the commissioners had acted were described in the petition, plaintiff made no examination of the award, and did not discover the error in the petition and award until long after the time had expired within which exceptions could have been filed, but that appellant and his counsel did discover such errors before the time within which exceptions might have been filed elapsed, and that apparently appellant had been awarded $925 for the condemnation of the 7 60-100 acre tract alone, instead of, as he knew was intended, for damages resulting from the condemnation and appropriation of both of said tracts. That with this knowledge and knowing the ignorance of appellee's counsel of such error, appellant wilfully and deliberately remained silent in regard to such errors, for the purpose of allowing such mistakenly drawn award to be made the judgment of the County Court, and in order that he might receive and appropriate to himself said sum of $925 as for the condemnation of the said 7 60-100 acre tract alone, when he knew that said sum was intended to cover damages resulting from the condemnation and appropriation of both tracts. That afterwards, to wit, on the 5th day of June, 1906, said mistakenly drawn award was entered upon the minutes of the County Court of said Ellis County as the judgment of said court, and even then appellee and its counsel did not discover the errors in the award and proceedings, but, still in ignorance of such errors, appellee, about the time of such entry paid to appellant the amount of such award, which he took and received knowing that it was paid under the mistaken belief that both said tracts of land had been duly condemned, and that the sum was paid as, and for, damages resulting from the taking of both; yet notwithstanding the receipt by him of said sum so awarded, under the circumstances shown, appellant, it was averred, was denying appellee's right to appropriate to its use said 10 63-100 acre tract of land, and was contesting appellee's right to construct its railway thereon, and was denying that the same had been legally condemned.

The other parties having disclaimed, the prayer was, in substance, that the record of said condemnation proceedings be reformed and corrected to conform to the facts, and to the intent of the commissioners and for general relief, etc., and the judgment rendered was in accordance with such prayer.

The petition was excepted to in that, first, the trial court was without jurisdiction to grant the relief prayed for; second, no cause of action was stated; third, the proceedings was an effort to amend a judgment of a court in the absence of any paper or memoranda to amend by, and upon alleged facts aliunde the record; and fourth, it was apparent that the errors alleged resulted from the negligence of appellee and its attorneys, and not through any act of appellant. The exceptions were overruled and the court's action in this respect is made the basis of the first, second, third and fourth assignments of error. The propositions submitted under these assignments assert, in substance, that a judgment can be corrected, or amended, after the term at which it was rendered only by reference to some docket entry, or some written document, or memoranda on file; that it was evident the mistake complained of resulted from the negligence of appellee's agents, wherefore it was not entitled to relief; and, furthermore, it did not affirmatively appear that the mistake was not discovered before the expiration of the term at which the award was made the judgment of the County Court, and that the petition was not verified.

The proceeding is not, strictly speaking, a motion under the statute to correct a mistake, miscalculation or misrecital, etc., in the judgment, nor is it an application for a new trial, because the party applying therefor had been prevented by fraud, accident or mistake from fully presenting his case on the original hearing; but it was, and is, an equitable proceeding based upon a mutual mistake not apparent of record to correct and reform the record in a quasi-judicial proceeding, so as to make the record show what actually took place upon the hearing. (McLane v. Bank, 96 Texas, 55.) It sufficiently appeared that the appellee's attorneys did not discover the mistake in the judgment until after the term of court at which it was rendered terminated. The fact that the petition was not verified could not be reached by a general demurrer. The court did not err in overruling the exceptions to the petition.

The trial court found, as indicated by the judgment, that the facts did not show such negligence on the part of the plaintiff as would preclude the granting of the relief prayed for, and if the evidence fairly supports this finding the judgment in this respect will not be disturbed. The negligence which appellant asserts should preclude the granting of relief, is that in some unexplained way the field notes of one of the tracts of land sought to be condemned failed to reach the draftsman of the petition for condemnation, and were not therefore inserted in such petition, and that the commissioners appointed to condemn the land, knowing what land it was desired should be condemned, did not read the petition but all parties proceeded upon the mistaken belief that the petition described all the land to be condemned; evidence was introduced as to the damage to all the land and an award was made as to all, but the award, as drawn, upon the mistaken assumption that the land condemned was properly set out in the petition, referred to the petition for

a description of the land. These facts did not show such a violation of a legal duty as would justify a court of equity in refusing relief as against a party who was present at the organization of the commission, knew what was expected to be litigated before the commission, knew that they were to condemn all the land and knew that the award made by them was intended to cover the damages to both tracts of land, and knowing these facts subsequently received the award. (Kelley v. Ward, 94 Texas, 289.) While it is true, as contended by appellant that he did not cause the mistake, yet he knew of the mistake and accepted the award knowing that it had been made for the damages to both tracts of land and to permit him now to retain the money and object to the reforming of the judgment would operate as a legal fraud. This the court would not tolerate.

Under our system of government all citizens hold their property subject to the paramount right of the State to take, and appropriate it to public use, due compensation being first made. The conditional paramount right of the State to take becomes absolute when compensation has been assessed or agreed upon and is paid. Whenever the owner accepts as compensation a sum of money, whatever the amount, and however arrived at, his property to the extent of the taking is expropriated and appropriated to the use of the public. The question of compensation out of the way, he must yield to the inevitable. The State's right is to take or accept without a conveyance, hence, when compensation is adjusted and paid, no conveyance is necessary. (City of San Antonio v. Grandjean, 91 Texas, 434; Hartshorn v. Potroff, 89 Ill., 509; Grace v. Walker, 95 Texas, 41; Evans v. Gulf, C. & S. F. Ry., 9 Texas Civ. App., 126; Holland v. Spell, 42 N. E. Rep., 1014.)

Under the authorities above cited, if the commissioners who acted between the parties to this record had never been appointed by the county judge, but had been chosen verbally by the parties, and had acted, without making any record whatever of their proceedings, and had made a verbal award of a sum of money to appellant for his damages for the appropriation of the land concerning which they acted, and he had accepted such sum of money, the expropriation and appropriation of his land to the public use would have been complete, and under the facts shown in this record the paramount right of the State, acting through appellee, its instrument for the public benefit, has been shown, and appellee had the right to have the award made by the commissioners show what they intended that it should show.

As we view it, this is a case where in condemnation proceedings there were irregularities, but a hearing was actually had as to all the land sought to be condemned, and an award was actually made as to all. By mistake the written award was made to apply, apparently, to only one tract, but the defendant in condemnation proceedings knew that it was intended to apply to both, and with this knowledge accepted the sum awarded and this proceeding is to make the award, afterward entered as the judgment of the County Court, show what it was in fact intended to show. Since neither judgment nor conveyance is necessary to the complete right of the State to appropriate private property to public use, and the right is complete when compensation has been accepted, however the sum may have been arrived at, and the record of the pro-

ceedings is a mere matter of evidence, we fail to see upon what principle appellant can rightfully complain that the written award, the amount of which he voluntarily received, has been made to show what it was intended to show, and no more. His rights were at an end when he accepted the compensation awarded him, with the knowledge that it was intended to apply to both tracts.

We are of the opinion under the facts appellant is estopped from disputing appellee's right to so reform the award and judgment as to show the true facts and that both tracts of land were condemned by the commissioners.

Appellant also assigns as error the ruling of the court in admitting parol evidence to show the facts alleged in the petition. If there was a mutual mistake on the part of the parties to the record, or a mistake of one party and what would amount to a legal fraud on the part of the other, if such mistake is not corrected, we think parol evidence would be admissible to show these facts as a basis to correct the award and judgment and make the record speak the true facts. This was what the trial court sought to do by the admission of the evidence and we conclude his action in this respect does not constitute error. The judgment is affirmed.

Affirmed.

W. S. DAVIS v. ELLEN G. HARDWICK ET AL.

Decided April 28, 1906.

1.—Charge—Failure to Define Terms Used—When Error.

That a failure of the court to define terms used in its charge will not require a reversal of the judgment is not a rule of invariable application. It is the duty of the court to so frame its charge as to distinctly separate the questions of law from the questions of fact, and to instruct the jury as to the law arising on the facts, and where a failure to do this has probably misled the jury the judgment will be reversed.

2.—Same.

Plaintiff sued to recover fifty shares of stock which had been pledged to secure certain joint debts of himself and H., deceased. H. paid said debts, received said shares of stock, had them cancelled and new certificates issued in his own name. Plaintiff testified that H. acquired said stock upon the understanding that he was to hold it only as security or pledge for plaintiff's indebtedness. The defendants claimed (1) that H. had bought the stock from plaintiff; or (2) if H. had in fact converted the stock, plaintiff's suit was barred by limitation. The court charged the jury that if they believe from the evidence that there was a conversion of said stock by H. more than two years before suit filed, to find for defendants; and if they believed from the evidence that plaintiff never parted with his title to said stock and is still the owner of the same to find for plaintiff. Held, under the facts of this case the court should have explained to the jury what would amount to a conversion, and what would amount to a parting by plaintiff with his title to the stock.

3.—Certificates of Stock—Endorsement in Blank.

A mere delivery of a certificate of stock endorsed in blank is sufficient to constitute it a pledge without any memorandum to that effect. The pledgee may fill in the blanks, have the stock registered in his own name and receive the dividends.

Appeal from the District Court of Tarrant County. Tried below before Hon. Mike E. Smith.

Stewart & Templeton, for appellant.—The court should have defined in said charge the meaning in law of the word conversion as used therein, or should in some plain and appropriate way have explained to the jury what facts would amount to a conversion of said stock. Wooters v. Kaufman, 67 Texas, 495; Brown v. Pridgen, 56 Texas, 127; Salado College v. Davis, 47 Texas, 137.

The assignment in blank by Davis of his stock in the defendant company and his delivery thereof to the original pledgees vested in such pledgees the legal title to said stock and they thereupon became the owners thereof and were entitled to have same transferred on the books of the company to them, and to have the original certificates canceled and new certificates issued in their names. Seeligson & Co. v. Brown, 61 Texas, 114 and 117; Cecil Natl. Bank v. Watsontown Bank, 105 U. S., 217; Johnson v. Laflin, 103 U. S., 800; State v. Smith, 14 Pac. Rep., 814, 824, 825; Wilson v. Little, 2 N. Y., 443; Colebrook on Collateral Secureties, secs. 282, 287, 288; Union & Planters Bank v. Farrington, 81 Tenn., 333, 336, 337; Cornick v. Richards, 3 B. J. Lea (Tenn.), 1, 25, 26; Cherry v. Frost, 7 B. J. Lea (Tenn.), 8.

When Hardwick paid the debts owing by Davis, to secure which the stock was pledged, he became subrogated pro tanto to the rights, and subject to the liabilities of the original pledgees of said stock, and he thus became for the time being, the owner of same and he likewise was entitled to have such stock transferred to him on the books of said company and to have the original certificates canceled and new certificates issued in his own name. When this was done, he held for the time being, the legal title to said stock, and Davis had temporarily parted with his title thereto, and with the ownership thereof. Faires v. Cockerell, 88 Texas, 428; Allison Bailey & Co. v. Phoenix Ins. Co., 87 Texas, 595; Cleveland v. Carr, 40 S. W. Rep., 410; Scott v. Rowland, 14 Texas Civ. App., 373; Whitaker v. Sanders, 52 S. W. Rep., 640; 2 Brandt on Sur., sec. 304; 4 Ga., 343; Truss v. Miller, 22 So. Rep., 863; Randolph v. Starke, 26 So. Rep., 59.

An erroneous charge is presumed to have been injurious, and unless it is affirmatively shown by the adverse party that no injury was thereby occasioned, the judgment should be reversed. Emerson v. Mills, 83 Texas, 388; Gulf, C. & S. F. Ry. Co. v. Greenlee, 62 Texas, 349; Dwyer v. Continental Ins. Co., 57 Texas, 184; Houston, E. & W. T. Ry. Co. v. Hardy, 61 Texas, 232; Hudson v. Morris, 55 Texas, 610; Williams v. Conger, 49 Texas, 602.

Capps & Canty and *Sidney L. Samuels,* for appellee.—The meaning of the third paragraph of the court's charge to the jury was entirely apparent, and the jury was not misled by same, but if appellant desired explanation or definition of the term "conversion," as used in the charge, it was his duty to have presented a special instruction to cover the omission. Texas & N. O. Ry. Co. v. Scott, 71 S. W. Rep., 26; Western U. Tel. Co. v. James, 73 S. W. Rep., 79; Galveston, H. & S. A. v. Waldo, 26 S. W. Rep., 1005.

CONNER, CHIEF JUSTICE.—The fifty shares of the capital stock of the Hotel Worth Company in the city of Fort Worth, to recover which appellant instituted this suit, had been pledged to certain banks to secure certain joint debts of appellant and W. P. Hardwick, deceased. W. P. Hardwick subsequently paid said joint debts, as also one or more individual debts of appellant, received said shares of stock, had them marked cancelled, and new certificates thereof issued in his own name. Appellant alleged and testified in effect that said stocks had been surrendered to and acquired by said Hardwick upon the understanding and agreement that the stock was to constitute a security or pledge only for appellant's indebtedness so paid by Hardwick, and that the certificates were to be returned when appellant should repay the sums so advanced.

The pleadings and evidence tend to show in behalf of appellees, who are the executors of the last will and testament of W. P. Hardwick, deceased, the following defenses in substance, namely: 1st. That in consideration of said payments appellant bargained and sold said stock and the absolute and entire interest therein to W. P. Hardwick. Or, 2d, That if there had been no absolute sale, said Hardwick, with full notice to appellant, had appropriated and converted said stock to his own use and benefit for such length of time as to preclude appellant's right of recovery under the two years statute of limitation.

In the first paragraph of the charge, the court instructed the jury to find for defendants if they should find "that during the lifetime of W. P. Hardwick, plaintiff, for a valuable consideration, sold and transferred to said W. P. Hardwick the 50 shares of stock in controversy." The two next succeeding paragraphs are as follows:

"In connection with the foregoing you are instructed that although you should believe from the evidence that there was a conversion of said stock by the said W. P. Hardwick, deceased, yet, if you further find that plaintiff knew of such conversion (if any) for a period of time more than two years next prior to the filing of plaintiff's original petition (excluding the time elapsing between the death of W. P. Hardwick up to the date of the qualification of O. P. Haney and Mrs. Hardwick as executor and executrix) then you will find for the defendants."

"If you should find from the evidence that plaintiff never parted with his title to said stock and is still the owner thereof, then you will find in favor of plaintiff against Ellen G. Hardwick and defendant Worth Hotel Company a verdict for the fifty shares of stock in controversy herein, and against Mrs. Ellen G. Hardwick the amount of any and all dividends (if any) which have accrued on said stock and been paid Mrs. Hardwick up to the present time with interest thereon at the rate of six percent per annum from the time or times you may believe from the evidence said dividends were received (if received) by Mrs. Hardwick."

The remaining paragraphs of the court's charge merely direct the jury as to what credits should be allowed in case of a finding for plaintiff, and as to the burden of proof, etc., and hence are not material to what we have to say.

A number of objections to the charge are urged, for instance, it is insisted that in the first paragraph above quoted entire the court failed to explain to the jury what would amount to a conversion and thus sub-

mitted a question of law only, and that the second paragraph also submitted a question of law in that the court did not instruct the jury what facts would amount to a parting by plaintiff with his title to the stock sued for. We conclude that under the peculiar facts of this case the charge as a whole presented a misleading view, and that the specific objections above named are well taken. A failure of the court to define terms used in his charge will not ordinarily require a reversal. But this is not a rule of universal application. The duty of the court is to "so frame the charge as to distinctly separate the questions of law from the questions of fact" and "instruct the jury as to the law arising on the facts." (Rev. Stats., art. 1317.) In cases where terms embody conclusions of law and when, as we think is the case here, a failure to explain or properly apply terms used in a charge is calculated to mislead a jury, or to induce a verdict predicated upon a misunderstanding of the proper application to be given to such terms, the court will reverse. (Harrison v. Houston, 91 S. W. Rep., 647.) In this case it is undisputed that appellant owned and pledged to the bank the shares of stock for which he sued; that W. P. Hardwick paid the debts to secure which the stock had been pledged and received the stock in return; that the stock was found in possession of Hardwick's legal representatives marked "cancelled," and that new stock therefor had been issued to W. P. Hardwick. There was also evidence to the effect that Hardwick after receiving the same voted the stock, and that appellant took no further interest in the affairs of the corporation for several years during which the stock was of value less in amount than the debts for which it had been pledged. The crucial points, then—the sharply contested issues—were: Did appellant consent or agree to Hardwick's retention and use of said stock with intent that the absolute title—the entire interest therein—should at once pass to and become absolutely fixed or vested in Hardwick? Or if not, and Hardwick received said stock as a pledge—as mere security—as appellant testified, did he so appropriate the stock to his own use as to amount to a conversion, and had it continued with notice thereof to appellant for the period of limitation pleaded? In this attitude of case it afforded the jury an insufficient guide to say to them that if they found that appellant parted with his title or that Hardwick converted the stock, etc., they should find for defendants. What would constitute a parting with the absolute right and title and its investment in Hardwick, or what would amount to a conversion, are questions of law that by the charge were left wholly for the jury to determine. The error into which a jury might thus be led, becomes more apparent when we consider more closely the evidence and the law arising thereon. The facts that Hardwick received the stock, caused it to be marked cancelled and new stock to issue in his own name, did not, of themselves necessarily amount to either a conversion or to the transfer of the absolute title. Such use was entirely consistent with the reciprocal rights of pledger and pledgee. Quoting from Mr. Cook, "a mere delivery of the certificate of stock indorsed in blank . . . is sufficient to constitute a pledge without any memorandum to that effect." The pledgee "may fill in the blanks and have the stock registered in his own name on the corporate books." And "dividends declared during the continuance of the pledge belong to the pledgee." See Cook on Stock

and Stockholders and Corporation Law (3d ed.), articles 465-466 to 468. See also, Seeligson & Co. v. Brown, 61 Texas, 114; Cecil Natl. Bank v. Watsontown Bank, 105 U. S., 217; Johnson v. Laflin, 103 U. S., 800; State v. Smith, 14 Pac. Rep. (Ore.), 814, 824, 825; Wilson v. Little, 2 N. Y., 443; Colebrook on Collateral Securities, secs. 282, 287 and 288; Union & Planters Bank v. Farrington, 81 Tenn., 333, 336, 337; Cornick v. Richards, 3 B. J. Lea (Tenn.), 1, 15, 26; Cherry v. Frost, 7 B. J. Lea (Tenn.), 9.

It is undisputed that the stock in question had been transferred in blank by appellant so as to constitute it a pledge and, in a very important sense at least, to pass the title under the authorities. The jury therefore could not, in such sense, have legally found as submitted by the court, "that plaintiff never parted with his title to said stock and is still the owner thereof." This was the only contingency submitted by the court as affording appellant any right of recovery and was, we think, well calculated to mislead the jury. For if the title passed by way of a pledge only, appellant had the right to recover it upon discharge of the indebtedness to secure which it had been pledged, unless barred of such right. If at the time Hardwick took or was given the possession of appellant's stock, or thereafter, it was the purpose, understanding or agreement, on the part of both Hardwick and appellant, that the stock in question and the entire beneficial interest therein should pass to and become wholly vested in Hardwick in consideration of Hardwick's payment of appellant's indebtedness, then appellant had no right of recovery. If, on the contrary, such was not the state of the case, and Hardwick held appellant's stock as pledgee only, then such holding was in the nature of that of a trustee and before it could be said that it was "converted," it would have to appear that Hardwick repudiated the trust and used appellant's stock with intent to thereby permanently deprive appellant thereof and to make it his, Hardwick's, own. And before appellee would be entitled to a verdict on this ground it would be necessary for the evidence to further show that appellant had notice of Hardwick's repudiation of the trust and appropriation of the stock, if any, and that such repudiation and appropriation with notice had continued for the full statutory period. These, briefly stated, were the issues, and should have been submitted by appropriate charges. The charge given, however, is objectionable, we think, in the particulars mentioned, and the judgment is accordingly reversed and the cause remanded for a new trial.

Reversed and remanded.

W. T. WAGGONER ET AL. v. G. F. WYATT.

Decided April 28, 1906.

1.—Assignment of Lease—Rights of Lessor.

A contract in writing executed by a lessee of land stating that he "has contracted and sold" to a third party the leased land, is in effect an assignment of the lease, and, there being in the lease a covenant against subletting, was in violation of said covenant as well as the statute against subletting, and was therefore inoperative as against the lessor.

2.—Same.

The fact that one holding under an invalid assignment of a lease of land offered to lease or purchase said land from the owner at a price probably in excess of its real value, does not exempt such person from liability in damages for preventing the owner from using his land as his ownership entitled him to.

3.—Reading Case in Hearing of Jury—Discretion of Judge.

The reading to the court in the hearing of the jury of a case involving the same or similar facts as the case on trial is a matter in the discretion of the trial court, and will not be reversible error in the absence of a showing that such discretion was abused.

4.—Issue—Sufficiency of Evidence—Duty to Submit.

It is the duty of the court to submit an issue raised by the evidence, although the evidence would not warrant a verdict thereon in favor of the party at whose instance it is submitted.

5.—Deprivation of Use of Land—Exemplary Damages.

Where the evidence showed a persistent and predetermined effort on the part of a trespasser to prevent the owner from using his property in his own way, it will support a claim for exemplary damages.

6.—Improper Assignments of Error.

Assignments of error considered, and held not entitled to consideration because too general and because improperly grouped.

Appeal from the District Court of Baylor County. Tried below before Hon. J. M. Morgan.

Hunter & Hunter and *Glasgow & Kenan* and *Chas. E. Coombes,* for appellant.—The court erred in permitting counsel for the plaintiff, over objection of defendants, to read in evidence to the court in the presence of the jury, the opinion of Chief Justice Conner in the case of Waggoner v. Snody, 82 S. W. Rep., 357 and 358, because said opinion was not the law under the facts of this case, and was calculated to mislead and bias or prejudice the jury, that said opinion has since been reversed, annulled and repudiated by the Supreme Court as containing neither law nor facts and was not binding on this court.

The court erred in permitting the introduction of the testimony of G. F. Wyatt and W. T. Snoddy as to conversation had with Bill Taylor, wherein Bill Taylor told Wyatt (the plaintiff) that if W. T. Waggoner had not paid the taxes on his two sections of land leased by him to Witherspoon that he, Waggoner, had forfeited his right to them and that he, Wyatt, could take possession of them, for the reason that the declarations of Bill Taylor was neither binding upon Witherspoon nor upon Waggoner and Bedford, as both Taylor and Witherspoon had testified that Taylor had no authority to cancel said lease, or to forfeit it, or to give Wyatt the right to reenter and take possession of said premises; that said evidence was hearsay and incompetent and made while Waggoner was holding possession of the lands under a valid contract with Witherspoon and after Wyatt had ratified the contract made between Witherspoon and Waggoner, and that neither Waggoner nor Bedford were present or knew anything of said conversation and are not bound thereby.

A. H. Britain, R. M. Ellerd and *J. T. Montgomery,* for appellee.

STEPHENS, ASSOCIATE JUSTICE.—This appeal is from a verdict and judgment in favor of G. F. Wyatt against W. T. Waggoner and C. I. Bedford for both actual and exemplary damages, the amount of the actual damages recovered being $240.66 and of exemplary damages, $350. The ground or theory of recovery was the wrongful and oppressive conduct of Waggoner and Bedford in preventing Wyatt from using two sections of land owned by him situated in a large pasture belonging to Waggoner and under the control of Bedford as his ranch boss. This pasture originally belonged to P. S. Witherspoon, who held the various sections of land situated therein as lessee, including the two sections owned by Wyatt, the lease on which had not expired, by a little more than two years, when the following written contract was entered into between Witherspoon and Waggoner:

"State of Texas, County of Wichita.

"This contract and agreement made and entered into this 5th day of June, 1901, by and between P. S. Witherspoon, of the county of Cooke, and State of Texas, and W. T. Waggoner of Wise County, Texas, witnesseth: The said Witherspoon being the owner of about one thousand cows and sections 8 and 10, block C, C. T. R. R. survey, and sections 6, 44, 56 and 58, block B, G. H. & H., all located and situated in the northeast corner of Knox County, Texas, has contracted and sold to the said Waggoner the said land and cattle on the following terms, to wit: Said 1,000 cows are not to be over the age of 5 or 6 years, and in case there are not 1,000 head in said pasture, then the said Waggoner is to take so many as there is in said pasture. The said Witherspoon is to furnish the said Waggoner one bull for each 25 cows and is to receive the sum of $25 per head for both cows and bulls, and guarantees a crop of 500 calves from said cows this spring.

"The said Witherspoon is to patent said lands, and in case he can not patent said land, then he is to deliver to said Waggoner any and all contracts that he has or may have affecting said lands. For and in consideration of the above the said Waggoner agrees and binds himself to pay said Witherspoon the said sum of $25 per head for said cows and bulls, and the sum of $1,000 for said land and improvements.

"Delivery of the said property to be made on the 20th day of June, 1901, and said Waggoner is to pay for same on or before November 1, 1901, without interest. Over and above the aforesaid $1,000 to be paid said Witherspoon the said Waggoner is to pay any and all money and expenses that said Witherspoon may be out in patenting.

"In case said Witherspoon can not patent them then he is to deliver his contracts to said Waggoner without costs to said Waggoner.

"Witness our hands at Beaver, the day and date above mentioned.

(Signed) W. T. Waggoner,
R. S. Witherspoon."

This contract was construed by the court as an assignment to Waggoner of the lease from Wyatt to Witherspoon of the two sections therein named owned by Wyatt (sections 8 and 10, block C, C. T. R. R. survey),

and therefore as amounting to a subletting of said sections to Waggoner. So construed, the written contract violated a covenant in the lease from Wyatt to Witherspoon, as well as the statute, against subletting. That Bedford, in obedience to the instructions of Waggoner, prevented Wyatt from using said sections for grazing purposes, as he undertook to do by pasturing the horses of one Snoddy at a given sum of money per month, and that Waggoner afterwards ratified his conduct in excluding said horses from said pasture and in denying Wyatt the right of pasturage therein, was treated by the court as an established fact. The issue submitted to the jury included only the assessment of actual damages and the determination of the issue of vindictive damages.

The construction placed by the trial court on the written contract above set out, we approve.

We are also of opinion that the facts warranted the court in instructing the jury that appellants were liable for actual damages; for, while Waggoner, through Bedford, offered to lease or purchase from Wyatt his two sections of land and that, too, at a price seemingly in excess of their value, it is nevertheless undeniably true that they denied him the right to make such use of them as his ownership clearly entitled him to. It is insisted, however, that there was evidence tending to prove that he acquiesced in the assignment of the lease under which Waggoner took possession, but after carefully examining the statement of facts, we fail to find any such evidence.

The above conclusions dispose of most of the assignments of error, especially those complaining of the charge submitting the issue of actual damages and of the court's refusal to give numerous special charges, which need not be further discussed.

The first assignment presented in the brief complains of a ruling on demurrer which is not found in the transcript.

The next assignment complains of a matter entirely in the discretion of the trial court, which discretion does not seem to have been abused and no injury could well have resulted from the action complained of, especially in view of the conclusions above stated.

The next assignment complains of the introduction of testimony which seeks to raise a question disposed of in the case of Waggoner v. Snoddy, 82 S. W. Rep., 357, 85 S. W. Rep., 1134, but if not, it is disposed of as harmless by the conclusions above stated.

The next assignment asserts that the court erred in submitting the issue of exemplary damages for want of evidence to warrant its submission. The only proposition submitted under this assignment is the following: "Unless the evidence is sufficient to sustain a verdict for exemplary damages according to the allegations upon which such claim is based, the court should not submit such issue to the jury." This proposition we understand to be at variance with that line of decisions in this State holding it to be not only the right but the duty of the court to submit an issue raised by the evidence, although the evidence would not warrant a verdict thereon in favor of the party at whose instance it is submitted. Besides, we are not prepared to say that there was no evidence tending to support the claim for exemplary damages as alleged in the petition. There was evidence of a persistent and predetermined effort on the part of appellants to prevent appellee from enjoying the

use and benefit of his property in his own way, although they conceded his right to the property and sought to have him to so use or dispose of it as to suit their wishes and purposes.

The next assignments assert "the court erred in overruling defendant's motion for a new trial, for the reason there was not sufficient evidence to support a verdict of $350 vindictive damages, or for any other sum as vindictive damages, and especially is this verdict of vindictive damages unwarranted by the evidence as against the defendant Waggoner." No proposition or statement is subjoined to the assignment, but we are referred to the proposition and statement submitted under the next preceding assignment just disposed of. Turning to the motion for a new trial we find that insofar as it sought to have the court review the evidence on this issue it was even more general, if possible, than the assignment just quoted. We would not, therefore, be warranted in sustaining this assignment.

As to the next two assignments, it seems to be conceded in the brief that owing to a deficiency in the bill of exceptions they are of little or no value.

The two remaining assignments are submitted together, but the issues raised by them are not such as should be grouped, and what is worse still, there is no merit in either of them. One asserts that the court erred in overruling the motion for a new trial because there was no evidence of a "sub-letting of the lands in controversy, nor of a transfer to Waggoner of the lease made by plaintiff to Witherspoon." The other asserts that the court erred in overruling the motion for a new trial "for the reason that the verdict is contrary to the evidence, against the charge of the court wherein he instructed the jury that, if they found exemplary damages against the defendants, to find against each separately, according to their culpability, and the verdict does not by its terms find separately against each defendant, but assesses the same jointly against said defendants." The judgment is therefore affirmed.

Affirmed.

Writ of error refused.

Southern Kansas Railway Company of Texas v. C. B. Cox.

Decided April 28, 1906.

1.—Freight Rates—Necessity for Publication.

The freight rates of railroads approved by the Interstate Commerce Commission are not binding upon the public unless posted and published as required by Act of Congress.

2.—Routing Shipment—Contributory Negligence—Relevant Testimony.

Where the carrier neglected to note on the waybill and shipping contract of a shipment of mules that they were to be unloaded and fed at a certain point en route, as requested by the shipper, and in a suit for damages for such neglect the carrier plead that the plaintiff was guilty of contributory negligence in not having such omission corrected as soon as discovered after the transportation had begun, the testimony of the plaintiff to the effect that at a station on the route he saw a man in the depot whom he took to be defendant's agent and called his attention to the omission and suggested that he had better wire about it, was relevant and material on the issue of contributory negligence, and this, whether the man spoken to was or was not defendant's authorized agent.

3.—Carrier—Deviating Shipment—Liability.

Where a carrier deviates a shipment from the route designated by the shipper it becomes liable for all damages resulting from its act, whether proximately or not.

ON REHEARING.

4.—Insufficient Assignment of Error.

An assignment of error which embraces several separate and distinct questions of law will not be considered because too general.

5.—Unlawful Intention of Shipper—No Defense to Carrier, When.

That the shipper had an arrangement with a third party by which the stock was to be unloaded at an intermediate point, and the shipper was to receive from such third party a rebate for the use of the cars from such point to the destination named in the shipping contract, can not affect the right of the shipper to have his stock routed as requested, with the privilege of unloading and feeding at a designated point, upon paying the customary freight rates.

Appeal from the District Court of Carson County. Tried below before Hon. B. M. Baker.

J. W. Terry and *H. E. Hoover,* for appellant.—The shipment from Panhandle being an interstate shipment, intended for Fort Scott, but billed to Memphis, and the only and undisputed evidence in the case being that the stock were billed to Memphis instead of to Fort Scott, in order thereby to procure a less rate of freight than the regular rate in force between Panhandle and Fort Scott, rendered it an illegal and void transaction, upon which no action could be maintained or damages recovered, and, as between the plaintiff and the defendant, no recovery could be had for anything done or promised. Seeligson v. Lewis, 65 Texas, 215; San Antonio & A. P. R. R. Co. v. Clements, 20 Texas Civ. App., 499; Missouri, K. & T. Ry. Co. v. Bowles, 40 S. W. Rep., 899; Houston & T. C. Ry. Co. v. Dumas, 43 S. W. Rep., 609; Gulf, C. & S. F. Ry. Co. v. Johnson, 71 Texas, 621, citing Welch v. Wesson, 6 Gray, 505; Wiggins v. Bisso, 92 Texas, 222; Central Transportation Co. v. Pullman Car Co., 139 U. S., 24; McGourkey v. Toledo & Ohio Ry. Co., 146 U. S., 536; Section 7, Interstate Commerce Act, p. 53, also section 10 et seq.; 2 Parsons on Contracts (7th ed.), 807; 9 Am. and Eng. Ency. of Law (1st ed.), pp. 880-881.

In a suit for damages for failure to perform a duty, or for breach of contract, plaintiff can only recover such sum as it would have cost him to have prevented the damages. The evidence in this case showing that plaintiff discovered the error in billing in time to have prevented the damages, that he had the means to do so, but did not, it was error to submit to the jury the question of whether or not he acted with ordinary care. The error being discovered, and the knowledge of how and the means to prevent injury being at his command, it was his duty to use them, and it was error to submit the question to the jury as to whether or not he acted as an ordinarily prudent person would have acted, especially so in view of the fact that evidence had been permitted to the effect that another person had informed him that the stock would go through all right. Texas & P. Ry. Co. v. Young, 60 Texas, 201; Texas & Pac. Ry.

Co. v. Rea, 65 S. W. Rep., 1117; Western U. Tel. Co. v. Hoffman, 80 Texas, 424; Texas & P. Ry. Co. v. Newton, 30 S. W. Rep., 476; Gulf, C. & S. F. Ry. Co. v. Simonton, 2 Texas Civ. App., 562; Southern Kan. Ry. Co. v. Isaacs, 49 S. W. Rep., 690.

Turner & Boyce, for appellee.

SPEER, Associate Justice.—Appellee instituted this suit against appellant to recover damages growing out of the latter's failure to note on the waybill and shipping contract of a shipment of mules from Panhandle, Texas, to Memphis, Tennessee, that the same were to be unloaded and fed at Fort Scott, Kansas. Appellant answered the suit, pleading specially that the contract was in violation of law and therefore void, and that plaintiff himself was guilty of contributory negligence. The case was tried before a jury and resulted in a verdict and judgment against appellant.

The conclusion which we have reached, that there is nothing in appellant's pleadings or the evidence showing that it has complied with the requirements of law in the promulgation of its rates under the Interstate Commerce Act, disposes of the greater number of its assignments of error here. (Atlanta, K. & N. W. Ry. Co. v. Horne, 59 S. W. Rep., 134; Gulf, Colo. & Santa Fe Ry. Co. v. Leatherwood, 69 S. W. Rep., 119.) We find absolutely nothing in the pleadings or evidence to indicate that appellant had established or published its rates in such manner as to make them binding under the Act of Congress regulating interstate commerce.

The testimony of appellee concerning the conversation had by him with appellant's agent at Miami, concerning the notation on the contract executed at Panhandle, was admissible upon the issue of his contributory negligence in failing to take steps to have his mules properly routed after having discovered appellant's dereliction in this respect. This was an issue tendered by appellant, and whether the person at Miami was actually appellant's agent at that place or not, and whether if he was he had any authority to bind appellant by his statements, are altogether immaterial to the admissibility of the evidence, since the circumstances of this conversation with a man whom appellee took to be appellant's agent was proper for the consideration of the jury, as bearing upon his failure to take further steps to have the mistake of the company corrected. Indeed, the writer, at least, doubts that the doctrine of avoidable consequences here attempted to be invoked has any application to a case like this.

The pleadings and evidence show that it was the purpose of appellee, in routing his mules by Fort Scott, Kansas, to unload and sell them upon that market. There was evidence to the effect that appellant, through its agent who made the contract, knew of this purpose. The failure, therefore, to note on the waybill and contract that the stock were to be unloaded at Fort Scott, Kansas, and the deviation to another route resulted in appellee's sustaining the injuries for which damages were awarded him by the jury. Having deviated the stock to a different route, appellant became liable for all damages, whether proximately

resulting from its act or not. (Hutchinson on Carriers, sec. 190; 6 Cyc., 383.) It follows from this that testimony was properly admitted as to the fact that appellee had made arrangements with a horse and mule company at Fort Scott for handling his stock, that this company would have paid him a rebate for the use of his cars from that place on to Memphis, that his mules contracted "barn fever" at the latter place, and that he incurred certain expenses in reshipping to Fort Scott.

There was nothing in the evidence to require or even to justify the trial court in submitting to the jury the issue whether or not appellee made appellant's agent his agent in the matter of billing out the stock.

We find no fault with the tenth paragraph of the court's charge of which appellant could complain. Clearly, under the facts appellee did not waive or intend to waive any of his instructions to appellant's agent with reference to routing his stock.

All assignments are overruled and the judgment is affirmed.

ON MOTION FOR REHEARING.

In the opinion filed on the original hearing of this case, we stated that there was nothing in the pleadings or evidence to indicate that appellant had established or published its rates in such manner as to make them binding under the Acts of Congress regulating interstate commerce, and appellant now complains in its motion for rehearing that its failure in this respect was due to the action of the trial court in sustaining an exception to its answer, of which action it complained on the original submission by assignment number 4 in its brief. We did not consider this assignment because we were then, and still are, of the opinion that such assignment is too general, embracing, as it does, a complaint that the court erred in sustaining the "plaintiff's first and second special exceptions, contained in its supplemental petition to the defendant's original answer," when these exceptions present entirely different questions of law. Appellee's special exception number 1 attacks appellant's answer, alleging the want of authority in the agent to make the contract declared on, while his exception number 2 is directed to that part of the answer which seeks to avoid the contract because in violation of the terms of the Interstate Commerce Act.

But if we were to regard this assignment, we are yet of opinion that the court committed no error in sustaining exceptions to section 2 of appellant's answer. That part of its answer reads: "Defendant further shows and avers that if the contract set out in said petition, claimed to have been entered into between plaintiff and defendant through its agent at Panhandle, whereby it was agreed that said stock should be routed by Fort Scott, Kansas, and that Fort Scott was the place of destination of said stock, and not Memphis, Tennessee, in order that said stock might be taken off the cars at Fort Scott and other stock there substituted in their stead to complete the journey, for which plaintiff was to receive compensation, or any other contract the evidence may show was made, which is not admitted but denied, then defendant says that said agent in making said contract exceeded his authority in so doing; that said contract was not only contrary to his authority and in violation of his duty to this defendant, but was also in violation of law, and

particularly in violation of sections 7 and 10 of the Interstate Commerce Act and also paragraphs B, C and D under said section 10, and therefore void, and can not form the basis of plaintiff's suit herein." As indicated in the original opinion, appellee's pleadings and evidence show that through an arrangement with a company of horse and mule buyers at Fort Scott he would have received from it a rebate for the use of the cars from that place to Memphis, Tennessee. Appellant was in no manner connected with this agreement for a rebate, and whether such an arrangement between the horse company and appellee was lawful, and therefore one which appellant was bound to respect, or not, can not affect the undoubted right of appellee to have his stock billed by way of Fort Scott, Kansas, with privilege of unloading and feeding there, upon paying the company's customary rates from point of origin to destination at Memphis. That his secret intention was to unload and sell at Fort Scott, and to allow the purchaser to complete the transportation under this contract, can not in the least affect the legality of his contract with appellant.

The motion for rehearing is in all things overruled.

Motion overruled.

Writ of error refused.

MAY, 1906.

Galveston, Harrisburg & San Antonio Railway Company v. Gus C. Warnecke.

Decided May 1, 1906.

1.—Destruction of Orchard—Measure of Damage.

In a suit for the value of fruit trees destroyed by the negligence of defendant the difference in value of the land, on which the orchard was situated, before and after the destruction of the trees, is not the proper measure of damages.

2.—Same.

The owner of land upon which growing trees have been destroyed by the negligence of another may either sue to recover damages for the injury to his land caused by the loss of the trees, or may sue for the value of the trees, and under some circumstances both claims for damage might be asserted. But the two causes of action are separate and distinct, and subject to different rules as to the measure of damage. In the latter case the measure of damage is the value of the trees when detached from the soil. Texas & Pac. Ry. Co. v. Gorman, 2 Texas Civ. App., 144, discussed.

Appeal from the District Court of Harris County. Tried below before Hon. W. P. Hamblen.

Baker, Botts, Barker & Garwood, Andrews, Ball & Streetman, and *C. L. Carter,* for appellant.—The court erred in submitting to the jury as the measure of damages the "fair valuation for the trees destroyed," the proper measure being the difference in the value of the real estate before

and after the trees were damaged or destroyed. Pacific Express Co. v. Lasker Real Estate Co., 81 Texas, 81; Houston & T. C. v. Smith, 46 S. W. Rep., 1046; International & G. N. Ry. v. McIver, 40 S. W. Rep., 438; Texas & Pac. Ry. v. Levi, 59 Texas, 675; Texas & Pac. Ry. v. Wallace, 74 Texas, 581; Missouri Pacific v. Cullers, 81 Texas, 389; Gulf, C. & S. F. Ry. v. Cusenberry, 5 Texas Civ. App., 114; Dwight v. Elmira, C. & N. Ry. Co., 132 N. Y., 200; Rowe v. Chicago & N. W. Ry., 102 Iowa, 287; Lousiville, E. & St. L. Ry. v. Spencer, 149 Ill., 97; Missouri Pac. Ry. v. Haynes, 42 Pac. Rep., 259; St. Louis & S. F. Ry. v. Hoover, 43 Pac. Rep., 854; Hays v. Pittsburg, G. S. & St. L. Ry., 47 N. E. Rep., 261; Baltimore & O. Ry. v. Countryman, 44 N. E. Rep., 266; 3 Elliott on Railways, sec. 1239, p. 1930.

The court erred in refusing to give the following special charges requested by defendant: "Should you find for the plaintiff under the instructions contained in the court's general charge, in estimating his damages, if any, you will not consider any damages that may have been caused to any of his trees which have been shown by the evidence to have been of no value when removed from the ground where they were growing, and you will assess his damages, if any, at the reasonable value of such fruit trees as had a market value when removed from the premises where they were growing."

"Growing fruit trees, which are attached to the soil and have no value separate and apart from the soil, are a part of the land upon which they are growing. Under the pleading in this case, should you find for the plaintiff, in assessing his damages, if any, you will find for him only the reasonable value of such of his fruit trees as you may find from the evidence were capable of being removed from the soil, as plaintiff can not recover for any trees shown to have been of no value detached from the ground upon which they were growing."

O. T. Holt and *Cobb & Campbell,* for appellee.—The proper measure of damage in this case was the value of the trees destroyed, and the court did not err in giving to the jury that portion of the general charge complained of. Houston & T. C. Ry. v. Smith, 46 S. W. Rep., 1046; Texas & Pac. Ry. v. Gorman, 2 Texas Civ. App., 145; Tyler, S. E. Ry. v. Hitchins, 63 S. W. Rep., 1070; Highland v. Houston, E. & W. T. Ry., 65 S. W. Rep., 650; Bailey v. Chicago, M. & St. P. Ry., 54 N. W. Rep., 596; Kansas City & O. Ry. v. Rogers, 67 N. W. Rep., 602; Fremont, E. & M. Ry. v. Crum, 46 N. W. Rep., 218; Matthews v. Missouri Pac. Ry., 10 Am. & Eng. Ry. Cases, 685; Missouri, K. & T. Ry. v. Lycan, 47 Pac. Rep., 526; Atchison, T. & S. F. Ry. v. Emerson, 8 Am. & Eng. Ry. Cases, 664; Atchison, T. & S. F. Ry. v. Geiser, 33 Am. & Eng. Ry. Cases, 97.

Where the plaintiff's cause of action is to recover the value of growing fruit trees, owned by him, and alleged to have been destroyed by fire, negligently set out by defendant, such trees being shown to have no market value separate and apart from the soil to which they are attached, and in which they are growing, the proper measure of damage is the reasonable intrinsic value of the trees to the owner, considering their location, condition and purpose for which the owner was using or might use the same. City of Dallas v. Allen, 40 S. W. Rep., 325; International

& G. N. Ry. v. Nicholson, 61 Texas, 553; Sinclair v. Stanley, 64 Texas, 74; International & G. N. Ry. v. Searight, 28 S. W. Rep., 39, and authorities therein cited; San Antonio & A. P. Ry. v. Stone, 60 S. W. Rep., 461.

PLEASANTS, Associate Justice.—This suit was brought by appellee against the appellant to recover the value of fruit trees and vines alleged to have been destroyed by fire caused by the negligence of appellant. The number and kind of the trees and vines destroyed and the value of each is alleged, the total amount sued for being $10,075.

The evidence shows that an orchard owned by plaintiff and situated near defendant's railway line in Harris County was destroyed by fire on the first day of May, 1903, and there was evidence tending to show that the fire was caused by a spark from one of appellant's engines. The evidence further shows that the fruit trees and vines destroyed by said fire when attached to the soil were worth the aggregate sum of $1,511.50, the amount recovered by plaintiff in the court below, but that none of them had any value when separated from the soil except the fig trees which could be replanted. Upon this evidence the trial court gave the jury the following instruction:

"You are charged that if you believe from the evidence that the defendant's engine set fire to the plaintiff's premises at the time and place charged in the petition, and that thereby the plaintiff's trees were destroyed as alleged by him, then you will find for the plaintiff a fair valuation for the trees so destroyed, if any. If you find for the plaintiff, you will find the amount, if any, for loss of the different kinds of trees that are claimed to have been destroyed, if any, setting forth the value of each kind of tree destroyed, if any."

Under the fourth assignment of error appellant complains of this charge on the ground that it sumbits a wrong measure of damages, the contention being that the proper measure of plaintiff's damage was the difference in value of the land upon which the orchard was situated before and after the destruction of the trees.

We think the assignment should be overruled. The measure of damage contended for by appellant was not applicable to the case made by the petition. While the charge complained of is inaccurate because it did not limit the amount of plaintiff's recovery to the value of the trees when separated from the soil, it is not subject to the objection presented by the assignment.

Appellant requested the court to give the jury the following instruction:

"Should you find for the plaintiff under the instructions contained in the court's general charge, in estimating his damages, if any, you will not consider any damages that may have been caused to any of his trees which have been shown by the evidence to have been of no value when removed from the ground where they were growing, and you will assess his damages, if any, at the reasonable value of such fruit trees as had a market value when removed from the premises where they were growing."

"Growing fruit trees, which are attached to the soil and have no value separate and apart from the soil, are a part of the land upon which they

are growing. Under the pleading in this case, should you find for the plaintiff, in assessing his damages, if any, you will find for him only the reasonable value of such of his fruit trees as you may find from the evidence were capable of being removed from the soil, as plaintiff can not recover for any trees shown to have been of no value detached from the ground upon which they were growing."

We understand the law to be that the owner of land upon which growing trees have been destroyed by the negligence of another may sue to recover damages for the injury caused his land by the loss of the trees, or may sue for the value of the trees, and under some circumstances both claims for damage might be asserted; but when the injured party sues only to recover the value of the trees his measure of damage is their value when detached from the soil, and if they have no value when separated from the land the only cause of action which arises from their destruction is one for damages for injury to the land, the measure of damage in such case being the difference between the value of the land before and after the injury.

The exact question presented in this case does not seem to have been decided in this State, and there is conflict in the authorities on the subject, but we think the better reason and the weight of authority supports the rule above stated. All of the authorities hold that growing trees are a part of the realty to which they are attached, and the destruction of the trees is an injury to the realty for which an action will lie. If the trees have a value when detached from the realty the injured party is not restricted in his remedy to a suit for injury to the realty, but may sue for the value of the trees, or he may combine both causes of action in one suit.

The two causes of action are, however, separate and distinct and subject to different rules as to the measure of damage. If the suit is for damage to the realty the plaintiff could not be restricted in his recovery to the value of the trees when detached from the soil, and we think it equally clear that in a suit for the value of the trees their value when attached to the soil, or the amount of injury occasioned the realty by their destruction, is not the proper measure of damage. (Houston & T. C. Ry. Co. v. Smith, 46 S. W. Rep., 1046; International & G. N. Ry. Co. v. McIver, 40 S. W. Rep., 438; Dwight v. Elmira, C. & N. Ry. Co., 132 N. Y., 200; Pacific Express Co. v. Lasker, 81 Texas, 81; Texas & Pac. Ry. Co. v. Levi, 59 Texas, 675.)

The distinction between the two causes of action is illustrated by the line of decisions in this State holding that the burning of grass roots or sod is an injury to the land, and the measure of damage in such case is the difference between the value of the land before and after the destruction of the sod; but if the suit is one to recover the value of the grass destroyed the value of the grass either for pasturage purposes or as hay may be shown and recovered. The only accurate means of determining the value of the sod or turf, it having no value when separated from the soil, is by showing the difference in the value of the land before and after its destruction, and this can only be done in a suit to recover damages for injury to the realty. We think growing fruit trees, which can not be transplanted and have no value when detached from the soil, bear the same relation to the land as the turf or sod, and

damages for the destruction of either can only be recovered in a suit for damages for injury to the realty.

Where an orchard is destroyed by the act of a tort feasor the owner is entitled to recover for the injury to his realty caused by such tort, and the defendant will not be heard to say that "although I have destroyed your orchard, your land if used for other purposes will produce as much or more revenue, and therefore you have not been injured." The owner of land is entitled to use his property for any lawful purpose he may desire, and when its value for that purpose is decreased by the wrongful act of another he is entitled to recover as damages the difference between its value for the purposes for which he desired to use it before and after the commission of the tort. (Texas & Pac. Ry. Co. v. Wallace, 74 Texas, 581.)

We do not regard the opinion in the case of Texas & Pac. Ry. Co. v. Gorman, 2 Texas Civ. App., 144, cited and relied on by appellee, as necessarily in conflict with these conclusions. It does not appear from the report of the case that the trees, for the value of which the suit was brought, did not have a value when detached from the soil which could be accurately ascertained, but on the contrary it may be inferred from the proposition advanced by the appellee in that case in support of the judgment that such value was shown. The only point which seems to have been expressly decided was that the plaintiff in suits of this kind may waive the damage to his land and sue to recover the value of the property destroyed. The following quotation from the opinion indicates the extent to which the question we are called upon to decide was involved in that case, and we think shows that the case is not authority for the proposition that in a suit to recover the value of growing trees, which are shown to have no value when separated from the soil, it is competent to prove and recover their value when attached to the soil. The court say:

"Appellant complains that the measure of damage applied by the court below for the destruction of the growing fruit trees and vines was their cash value, when they should have been treated as a part of the land, and its lessened value the proper measure.

"A number of decisions in such cases recognize as correct the rule adopted by the court below. (Whitbeck v. New York Cent. Ry., 36 Barb., 644; Norfolk & W. Ry. Co. v. Bohannan, 7 S. E. Rep., 236; Montgomery v. Locke, 72 Cal., 75.) Other authorities, however, perhaps with better reason, adopt the rule contended for by appellant. (3 Sedg. on Dam., 933, 934.) This rule, however, is generally adopted for the benefit of the owner of the land, and not for the one causing the injury, upon the manifestly just ground that by the destruction of a valuable fruit, ornamental or shade tree, the value of the land may be lessened in an amount many times the value of the tree itself, and in such case the rule adopted by the court below would not furnish adequate compensation.

"We believe where the thing injured or destroyed is a part of the realty, the lessened value of the land will come nearer furnishing a just rule in its application to all cases than the one adopted by the court (Pacific Express Company v. Lasker Real Estate Association, 81 Texas, 81), but we do not believe appellant is in a position to complain that a

different rule was applied to it in this case. If appellee is willing to accept the cash value of his trees and waive the incidental damage, if any, done by their destruction to his farm, it would seem that appellant should be satisfied."

Where the property destroyed is a part of the realty and has no value when detached therefrom the only cause of action which arises from its destruction is one for damages for injury to the realty, and to allow appellee in this case to recover the value of the trees when attached to the soil would in effect allow him to recover for the injury to his land, for which he has not sued.

We are of opinion that the trial court erred in refusing to give the requested instruction, and its judgment is therefore reversed and the cause remanded.

Reversed and remanded.

IDA BANNER ET AL. v. JOHN E. ROLF ET AL.

Decided May 2, 1906.

1.—Will—Charitable Bequest—Beneficiaries.

A devise of property to the trustees of an incorporated church, "for the benefit of the poor, helpless and dependant members and orphan children of such church," was not void because the beneficiaries were insufficiently described; the "poor, helpless and dependents" were a class capable of identification, and baptized children of deceased members, if it was a society practicing infant baptism, were properly described as "orphans of the church." Nolte v. Meyer, 79 Texas, 351, distinguished.

2.—Incorporated Church—Administration of Bequest.

Property bequeathed to an incorporated church in trust for charitable purposes is to be managed and the trust administered, not by the body of the members, but by the corporate trustees. Rev. Stats., art. 660.

3.—Charitable Trust.

The possibility of the trustees of a charitable bequest administering the trust for their personal benefit will not render the bequest void.

4.—Same—School.

A bequest of ground for the location of a school building and of funds for the support of a school construed, in connection with other bequests for the support of orphan children, as contemplating a school for the education of such orphans.

5.—Practice on Appeal—Presumptions.

In the absence of a statement of facts it will be presumed that evidence necessary to sustain the judgment was introduced.

Appeal from the District Court of Travis County. Tried below before Hon. V. L. Brooks.

G. W. Allen and *Cochran & Penn,* for appellant.—When the will is so uncertain as to the persons to be benefited that there can be no standard to determine in the courts of the country the rights of the persons who may claim to participate, the bequest is invalid. Nolte v. Meyer, 79 Texas, 351; Fosdick v. Town of Hempstead, 11 Law Rep. Ann., 715; Jones v. Green, 36 S. W., 729.

A bequest for the support of the poor and dependent members and orphans of a particular local church organization is not a public charity, and where property is to be administered by the membership of such a church, who are forbidden to sell the same for all time, the bequest is void because violative of the constitutional provision of this State against the creation of a perpetuity. Rev. Stats., art. 713; Philadelphia v. Masonic Home, 40 Am. St. Rep., 736; Fosdick v. Hempstead, 11 Law Rep. Ann., 715; Hardin v. Trustees, 47 Am. Rep., 555; Baptist Church v. Witherell, 24 Am. Dec., 223; Dulany v. Middleton, 72 Md., 67; Heiss v. Murphey, 40 Wis., 276; Fifield v. Van Wyck, 64 Am. St. Rep., 745 and note; Hoeffer v. Clogan, 63 Am. St. Rep., 241 and note.

A bequest of property to trustees to be used in establishing and maintaining a school, without defining what kind of a school as to the nature of its teaching and the class of persons to be educated thereat in any way, is too indefinite and can not be sustained as a trust for a charitable use. Nolte v. Meyers, 79 Texas, 355; Stratton v. Institute, 5 Law Rep. Ann., 33.

Wm. Von Rosenberg, Jr., D. W. Doom and *D. H. Doom*, for appellees. —The testatrix, Johanna Petterson, had the legal right to devise in trust the lands and money involved in this contest in perpetuity for charitable uses, and the language of her will manifests her intention to so do. Rev. Stats., 1895, art. 660; Bell County v. Alexander, 22 Texas, 350; Paschal v. Acklin, 27 Texas, 173; Elwell v. Universalist General Convention, 76 Texas, 514; Carleton v. Roberts, 1 Unreported Cases, 587; Gidley v. Lovenberg, 79 S. W. Rep., 831; Vidal v. Girard, 2 Howard, 127; Perin v. Carey, 24 Howard, 465; Jones v. Habersham, 107 U. S., 174; Dye v. Beaver Creek Church, 59 Am. St. Rep., 724; Shields v. Jolly, 42 Am. Dec., 349; Estate of Hinckley, 58 Cal., 457; Biscoe v. Thweatt, 86 S. W. Rep. (Ark.), 432; Hoeffer v. Clogan, 63 Am. St. Rep., 241, and note, page 248; City of Philadelphia v. Girard's Heirs, 45 Pa. St., 9, 84 Am. Dec., 470; Sears v. Chapman, 35 Am. St. Rep., 502; Harrington v. Pier, 76 Am. St. Rep., 924.

The purposes for which the three acres were set apart and for which the bequest of the residue of the estate was made, namely, to be used in maintaining a school to be established on the three acres of land, were stated with sufficient certainty in the will. Bell County v. Alexander, 22 Texas, 350; Russell v. Allen, 107 U. S., 163; Bedford v. Bedford, 35 S. W. Rep., 926.

KEY, ASSOCIATE JUSTICE.—This is a proceeding by the heirs at law of Johanna Petterson, deceased to have set aside and declared void certain provisions of the will of the decedent. It originated in the County Court, reached the District Court by appeal, and from a judgment of that court in favor of the contestee the contestants have appealed. There is no statement of facts, and the case is submitted in this court on the trial judge's findings of fact, which are as follows:

"1. Mrs. Ida Banner, Gus Bergquist, Mrs. Matilda Lonn, Karoline Albertina Mild, Mrs. Annie Sophia Johnson, Carl Johan Emil Johnson-Strand, Carl Freithof Engborg, John Bror Engborg, and Carolina Eleanora Hapsch, are the heirs at law of the deceased, Johanna Petter-

son. The other contestants named in the pleadings are the husbands of those of the above named contestants who are married women.

"2. John Rolf, contestee, is the duly appointed, qualified and acting executor of the last will of the deceased Johanna Petterson.

"3. The will of Johanna Petterson, deceased, was duly probated by order of the County Court of Travis County, Texas, on April 12, 1902.

"4. The will of said deceased consists of eleven paragraphs each bearing a distinct number, and the fourth, fifth and tenth paragraphs thereof, which are the subject of this contest, read as follows:

" 'Fourth.—I give and bequeath and devise to the trustees of the Swedish Evangelical Lutheran Church of New Sweden, Travis County, Texas, a certain tract of land, the same being my homestead, and consisting of two hundred and six and two-thirds acres of land in Travis County, Texas, described as follows, to wit: One hundred and six and two-thirds acres out of the Thomas Smith survey, with metes and bounds as follows: Beginning at the northwest corner of the J. A. Stanline survey; thence south sixty degrees east, nine hundred and fifty varas to stone for corner; thence north thirty degrees east, six hundred and thirty-three and one-half varas to stone for corner; thence north thirty degrees east, six hundred and thirty-three varas to stone in Cottonwood creek; thence north sixty degrees west, nine hundred and fifty varas to stone for corner; thence south, thirty degrees west, six hundred and thirty-three and one-third varas to place of beginning, containing one hundred and six and two-thirds acres of land, more or less.

"And one hundred acres of land out of the Theophilus Elison survey in Travis County, Texas, with metes and bounds as follows: Beginning at the northeast corner of the east half of the T. Elison survey for the northeast corner of this survey, thence north sixty degrees west, seven hundred varas to stake; thence south ——— degrees west, eight hundred and six varas to stake; thence south sixty degrees east, seven hundred varas; thence north thirty degrees east, eight hundred and six varas to place of beginning, containing one hundred acres of land, more or less, together with all and singular the rights, members and appurtenances to the same in any manner belonging unto the said Swedish Evangelical Lutheran Church, for the benefit and support of the poor helpless and dependent members and orphan children of said church, and if there should ever be a division in said church, this request shall remain with and to the original Swedish Evangelical Lutheran Church of New Sweden, Travis County, Texas.

" 'And it is my will that said two hundred and six and two-thirds acres of land shall never be sold or conveyed, but that the said Church shall distribute the yearly income from the same to its dependent orphans and members as above directed.

" 'It is also my will that that three acres out of the northwest corner of the above described one hundred and six and two-third acre tract of land be set aside for use as a building site for school purposes, the same to be administered and controlled by the trustees of said church.

" 'Fifth.—I give and bequeath to Eric Pearson and his wife, Martha Pearson, for their use and behoof during their natural lives, thirty acres of land out of the Thomas Smith survey described as follows, to wit: Beginning at the southwest corner of C. M. Newgrews survey of one

hundred and six and two-thirds acres, part of said Smith survey; thence north sixty degrees west, with Stamline's north line, four hundred and eighty three and one-half varas to the southwest corner of this tract of land; thence north thirty degrees east, three hundred and fifty and one-fourth varas, to stake for northwest corner of this tract; thence south, sixty degrees east, four hundred and eighty-three and one-half varas, to a fence post in a drain (marked X) on the line between Mrs. Petterson's and C. M. Newgrews surveys; thence south thirty degrees west, three hundred and fifty and one-fourth varas, to the place of beginning, containing thirty acres of land, more or less.

"'After the death of Erich and of Martha Pearson, I give and bequeath said thirty acres of land to the Swedish Lutheran Church of New Sweden, Texas, to be used as specified in item four of this will.

"'10. I give and bequeath the remainder of my estate not herein devised in trust to the trustees of the Swedish Lutheran Church of New Sweden, Texas, to be used in maintaining the school that shall hereinafter be established on the three acres of land designated in section four of this will, for school purposes.'

"5. John Rolf holds in his capacity of executor of the will of Johanna Petterson, deceased, the land described in those paragraphs of the will above set out, and the sum of $2,259 in money, after having duly discharged all duties devolving upon him in such capacity, except the directions contained in said paragraphs.

"6. The Swedish Evangelical Lutheran Church of New Sweden is a religious corporation, duly incorporated under the laws of the State of Texas; and the parties named in the pleading as trustees, are the duly elected and acting trustees of said corporation, and were such at the date of the execution of the testator's will, and at the date of her death.

"7. No part of the land described in clauses four, five or ten of the will is located in any incorporated city or village or within two miles thereof."

Opinion.—Appellants assert that the fourth and tenth clauses of the will are void. The fourth is assailed upon the grounds, (1) that the beneficiaries as a class are not sufficiently described; (2) that it creates a private trust or perpetuity, for the reason that it leaves the trust to be administered by the membership of the church, thereby authorizing each member to vote for himself as a beneficiary; or (3) if the trust is to be administered by the trustees of the church, then such trustees have the power to determine that they themselves are entitled to participate in the bequest, which, it is contended, creates a private trust and not a public charity. That part of the fourth clause which directs that three acres of the land disposed of by said clause be set aside for use as a building site for school purposes, and the tenth clause bequeathing the residue of the estate to the trustees of the church to be used in maintaining such school, are assailed, the contention being that these provisions are void on account of the failure of the will to define the kind of school to be established, and the class of persons entitled to attend such school.

The objections urged are not regarded as tenable. Two classes of beneficiaries are named in the will. One class consists of certain mem-

bers of the church named in the will, and such class is identified as those who are not only poor but also helpless and dependent; and we see no reason why such class of persons can not be readily identified. The other class is designated as the orphan children of said church. It is matter of general information that according to the tenets, laws and regulations of some churches, children whose parents are members of the church are baptised into the church, and such class of children whose parents are dead may properly be described as orphans of the church. Other churches do not practice infant baptism, and receive members only upon personal confession of faith. The record in this case does not show to which class the church referred to belongs; and it may have been shown in the court below that it belongs to the former class, in which event little difficulty would be encountered in determining who were the orphan children of the church. There being no statement of facts in the transcript, it will be presumed that proof was made of all facts essential to the validity of the will. We conclude that the will sufficiently identifies the classes of persons intended as beneficiaries. (Bell County v. Alexander, 22 Texas, 350; Paschal v. Acklin, 27 Texas, 173; Gidley v. Lovenburg, 79 S. W. Rep., 831; Elwell v. Universalist Genl. Convention, 76 Texas, 517; Jones v. Habersham, 107 U. S., 174; Dye v. Beaver Creek Church, 59 Amer. State Reps., 724; Shields v. Jolly, 42 Am. Dec., 349; Estate of Hinckley, 58 Cal., 457; Hoeffer v. Clogan, 63 Am. St. Rep., 241; Biscoe v. Thweatt, 86 S. W. Rep., 432.)

The case of Nolte v. Meyer, 79 Texas, 351, relied on by appellants, is not regarded as analogous. In that case a deed was made to "the German citizens comprising the neighborhood six miles west of Brenham in the east edge of Labade Prairie, Washington County," and the school trustees thereafter to be appointed by such citizens. The Supreme Court held that as there were no trustees in existence when the deed was made, and the boundaries of the neighborhood referred to were uncertain and impossible of ascertainment, there was no grantee and the deed was void. In the case at bar the church was incorporated and had a board of trustees at the time the will was made, and the beneficiaries are pointed out with as much certainty as they were in the recent case of Gidley v. Lovenburg, supra, which is much more analogous.

We do not agree with appellants' contention that the will necessarily authorizes the members of the church to administer the trust. It may have been shown by the testimony that, as required by article 660 of the Revised Statutes, all the secular or business affairs of the church are managed and controlled by the trustees; and, if such be the case, the disposition made by the trustees of any fund of the church might properly be spoken of as a disposition by the church. And the language of the will "that the said church shall distribute the yearly income from the same to its dependent orphans and members, as above directed," may properly be construed to mean that the church, by its governing officers or its trustees charged with the management of its business affairs, should make the distribution referred to.

The further contention that this construction would authorize the trustees to declare themselves beneficiaries, is not regarded as furnishing a sufficient reason for nullifying the clauses of the will under con-

sideration. It is not to be supposed that the testatrix contemplated the improbable contingency that the church would select as trustees any person who could properly be described as a poor, helpless and indigent member of the church, or as an orphan child of the church; and therefore it is reasonably certain that she intended to exclude the trustees from the benefits of the will. It may be true in this case, as in many others, that the trustees might, by improper conduct, divert the trust property to their own use; but the existence of such possibility affords no reason for declaring such trust void and nullifying the provisions of the will intended for the establishment of a laudable public charity.

Insofar as the will has reference to a school to be established upon the land, we are of opinion that these provisions were intended for the same beneficiaries which had been previously designated primarily for the benefit of the orphan children of the church; and if any revenue should be derived from the school, either as rent or tuition, it should be regarded as income, and distributed among the dependent members and orphans of the church, as directed by the fourth clause of the will. It was doubtless the intention of the testatrix to vest in the trustees large discretion concerning the school, including the time of its establishment and all other details, which we think it was competent for her to do; and we hold that the provisions in reference to the school are not void on account of uncertainty.

No error has been shown and the judgment is affirmed.

Affirmed.

Writ of error refused.

Gulf, Colorado and Santa Fe Railway Company v. H. L. Dyer.

Decided May 2, 1906.

1.—Passenger Carrier—Fare—Ticket—Keeping Office Open.

Testimony in regard to temporary absence of ticket seller of railway from office held to show that same was not kept open for half an hour before departure of train.

2.—Same.

The right of a railway to charge a passenger who has no ticket four cents per mile is conditioned by the proviso to the statute (Rev. Stats., art. 4542) upon its ticket office being kept open for half an hour before the departure of the train, irrespective of whether the passenger applied to purchase a ticket and was prevented from doing so by such failure.

3.—Same—Damages—Ejection of Passenger.

A passenger entitled to be carried on a train for three cents per mile and offering to pay that fare, is not bound to pay four cents when demanded in order to reduce the resulting damages, but may, without violence, stand on his rights, suffer ejection, and recover the damages resulting therefrom.

4.—Same—Tender of Fare.

Tender of the three cent per mile fare is not necessary where the four cent rate was demanded and nothing less would have been accepted.

5.—Charge—Omission.

Defendant can not complain of a charge to find in his favor upon the hypothesis which it stated, though such charge would have been justified on one more favorable to him.

6.—Expulsion from Train—Damages.

A verdict for $300 held not excessive damages for wrongful expulsion of a passenger from a train.

7.—Jury—Misconduct—Requesting Instructions.

Questions asked by the jury as to the effect of a judgment for less than the amount sued for upon the costs of the case, held not to show misconduct or improper motive.

Appeal from the District Court of Brown County. Tried below before Hon. Jno. W. Goodwin.

The jury during their deliberations returned to ask the court whether, if they found a verdict for less than $3,000, the amount claimed in plaintiff's petition, defendant would then have all the costs to pay. The court instructed them that they had nothing to do with the question of costs. They returned a verdict for $900 and costs. Defendant moved for a new trial on the ground that the question, the reply and the verdict showed that they were not making an honest effort to determine the extent of the damages.

G. N. Harrison, J. W. Terry and *Chas. K. Lee,* for appellant.—The law does not contemplate that the carrier shall be deprived of the protection of the statute where a reasonable opportunity is given to purchase a ticket, but the passenger does not get a ticket because he loiters and delays and then happens to have gone to the ticket window at the very instant the agent is called away for a moment to discharge some other duty. 26 Am. & Eng. Enc. Law, 646; Robinson v. Varnell, 16 Texas, 386-389; State v. DeGress, 53 Texas, 398; McLelland v. Shaw, 15 Texas, 320; Fordyce, Rec. v. Manuel, 82 Texas, 527.

The law does not require that a ticket agent shall be at the ticket window every minute and every second in order to entitle the carrier to charge the four-cent rate. It is sufficient that agent be there at such time and under such circumstances as that an intending passenger exercising reasonable diligence could secure a ticket. Same authorities.

The court's charge eliminates any question of any obligation on the part of the passenger to use reasonable efforts to get a ticket before he got on the train, and places the plaintiff's right to recover on the naked proposition that an agent had to be kept at the ticket window every minute and every second. This is not the law. Gulf, C. & S. F. v. Sparger, 39 S. W. Rep., 1001.

After having loitered up in town until the train whistled for the station, and rushed down to the depot, even though they made such effort as they say they did to get a ticket, their failure being chiefly the result of an unusual coincidence, to wit, a momentary absence of the lady from the ticket window, and this too, in an effort to serve the traveling public, the duty was certainly on them to use reasonable efforts to reduce their damages to a minimum and to get off at Bangs and buy a ticket.

Under the facts of this case, therefore, it was error to charge that they had a right to tender fare clear to Brownwood. England v. International & G. N. R. R., 73 S. W. Rep., 24; Russell v. Missouri, K. & T. Ry., 12 Texas Civ. App., 630; Texas & P. Ry. Co. v. Cole, 1 S. W. Rep., 629; Pullman Car Co. v. McDonald, 2 Texas Civ. App., 322.

It is the duty of one exposed to injury of any character to use reasonable diligence to reduce the damage to a minimum. The parties can not recover damages for injuries brought on them by their own fault and wilful desire to aggravate their own damages. Southern Pac. Co. v. Patterson, 7 Texas Civ. App., 455.

Jenkins & McCartney, for appellee.—Before a railroad company in Texas can demand the payment of four cents per mile for the carrying of a passenger, it must keep its ticket office open and some one in it to sell tickets during the entire thirty minutes provided by law before the departure of its train. Missouri Pac. Ry. Co. v. McClanahan, 66 Texas, 530; Mills v. Missouri, K. & T. Ry. Co., 94 Texas, 242; Atchison, T. & S. F. Ry. Co. v. Dwelle, 24 Pac. Rep., 503; Atchison, T. & S. F. Ry. Co. v. Hogue, 31 Pac. Rep., 698; Nellis v. New York C. Ry. Co., 30 N. Y., 505; Porter v. New York C. Ry. Co., 34 Barb., 356.

Recurring to the authorities cited in support of the proposition that it was appellee's duty to pay the fare demanded in order to reduce their damages, we only say that all such authorities as sustained this proposition were repudiated by the Supreme Court of this State of the recent cases of Texas & P. Ry. Co. v. Payne, 99 Texas, —, and that line of cases that was so well illustrated by this court in Gulf, C. & S. F. Ry. Co. v. Halbrook, 12 Texas Civ. App., 481, was followed and approved.

EIDSON, Associate Justice.—This is a suit brought in the court below by appellee against appellant for damages on account of the alleged wrongful expulsion of appellee by appellant from its train. A trial was had before the court and jury and verdict and judgment rendered and entered for the plaintiff in the sum of $900. A motion for a new trial was made by appellant, and upon hearing said motion, the court below ordered a remittitur of $600, and on the same being filed, judgment was entered in favor of appellee against appellant for the sum of $300, and from that judgment appellant has perfected this appeal.

Appellee, without previously purchasing a ticket, boarded the train of appellant at Santa Anna for the purpose of going to Brownwood, claiming that he applied at the ticket office of appellant at the former place about the time of the arrival of the train and immediately before its departure, for a ticket to Brownwood, and there was no one in said office to sell him such ticket. When the conductor came to him for his ticket, he offered to pay his fare, and handed him some money. The conductor demanded of him four cents per mile, which he refused to pay. The testimony is conflicting as to the amount handed the conductor by appellee, the conductor claiming that appellee handed him only fifty cents, which was the fare to Bangs, the next station, at four cents per mile; and appellee claiming that he handed the conductor sixty-five cents, which was the fare to Brownwood at three cents per

mile, and that the conductor retained fifty cents for the fare at four cents per mile to Bangs, and handed him back fifteen cents, and told him to get off at Bangs and get a ticket to Brownwood.

There was also a conflict in the testimony as to the reasons given by appellee to the conductor when he called on him for his ticket, as to why he did not procure a ticket at Santa Anna. The appellee testified that he told the conductor that he failed to obtain a ticket at Santa Anna on account of there being no one in the ticket office to sell same to him; and the conductor testified that the appellee told him that the reason he did not obtain a ticket at that place was he did not know the time to do so. The conductor, however, testified that later, and when he called on appellee for his ticket after the train passed Bangs and before he was ejected, appellee stated that his failure to procure a ticket at Santa Anna was on account of there being no one in the ticket office to sell same to him. The fact that appellee declined to pay the four cents per mile demanded by the conductor is undisputed. Appellee was ejected from appellant's train after the train passed Bangs, which was the next station to Santa Anna in the direction of Brownwood.

The fact that there was no one in the ticket office of appellant at Santa Anna authorized to sell tickets during the entire period of thirty minutes immediately prior to the departure of the train which appellee boarded, is not controverted by the testimony. The testimony of appellant shows that for an appreciable period of time during the thirty minutes immediately prior to the departure of said train, neither one of the parties who were authorized to sell tickets were in the ticket office. Brown, the agent testified that he left the office when the train arrived and went to the express or baggage car, which was some twenty or thirty feet from the ticket office, and remained until the train departed, and that he left his wife, who was his assistant, and the only other person authorized to sell tickets, in the ticket office during the time he remained away.

His wife, Mrs. Brown, testifies that while her husband was at the express car she went out on the platform twenty or thirty feet away from the ticket office, to inquire of her son about putting the mail on the train; and as she stepped out on the platform she met a lady friend with whom she passed the time of day, and while she was talking to her lady friend she saw her son returning from the train with the mail sack, and she said to him: "You got it in all right," and he said "Yes." As she was returning to the ticket office, and as she reached the door of the waiting room, a man came running from the train with a deposit receipt for a deposit of money he had left with the agent, and wanted to know if he could get his money, and she replied that she would have to see Mr. Brown, the agent, before she could do anything with it, and that she then went to the express car where Mr. Brown was, and asked him what to do with the receipt, and he told her to pay it and take up the receipt, and she then went back to the ticket office as quickly as she could get there, and she was not out of the depot building any more until the train left.

While the precise period of time that Mrs. Brown was out of the ticket office, and no one was there authorized to sell tickets, does not

appear from the testimony, and while it does appear that the period was short, it also appears that it was long enough for her to look after and attend to two separate business matters: One that of seeing that the mail was properly placed on the train, and incidentally of passing the time of day with a lady friend; and the other, ascertaining the correctness and proper disposition to be made of a deposit receipt. In our opinion, the time employed in these matters, if utilized in the ticket office, would have been sufficient to have furnished one or more parties desiring tickets with same. In other words, this testimony shows that appellant's ticket office was not kept open half an hour prior to the departure of the train in question, as contemplated by article 4542, Sayles Rev. Stat., so as to authorize it to charge more than three cents per mile fare.

In the case of Missouri Pac. Ry. Co. v. McClanahan, 66 Texas, 530, the Supreme Court holds that if the railway company fails to keep its ticket office open for half an hour previous to the departure of the train, it can in no case rightfully demand fare of a passenger having no ticket at a rate of more than three cents per mile; and in the case of Fordyce v. Manuel, 82 Texas, 527, it is held that there must also be an agent in the office to sell tickets. In the former case, Judge Gaines delivering the opinion of the court, uses this language: "The section referred to fixes the passenger fare upon all railroads in this State at three cents per mile, and contains the following provisos: 'Provided, however, that where the fare is paid to the conductor, the rate shall be four cents per mile, except from stations where no tickets are sold. . . . Provided further railroads shall be required to keep their ticket offices open half an hour prior to the departure of trains, and upon failure to do so they shall not charge more than three cents per mile.' The first proviso in the section as quoted was obviously intended to induce passengers to buy tickets before entering the cars, and was doubtless inserted in the interest and for the protection of the railroad companies. The object of the second, on the other hand, was to protect passengers against the contingency of having to pay the advanced rate of fare without being afforded ample opportunity to procure tickets. There is nothing in the language of this proviso to indicate that the Legislature intended to make of it other than an absolute rule, and we see no reason why its operation should be made dependent upon attempt or intent of the passenger to buy a ticket. If the railroad companies desire the benefit of the law in this regard they have only to comply with it by keeping their offices open, as the statute requires. The regulation is reasonable and easy to be observed. In the opinion of the court, if these companies keep their ticket offices open half an hour before the departure of their trains, they have a right to claim of passengers entering the cars without tickets fare at the rate of four cents per mile; but if the office be not so kept open, in no case can more than three cents per mile be rightfully demanded."

In the case of Mills v. Missouri, K. & T. Ry. Co., 94 Texas, 253, Judge Williams delivering the opinion of the court approves the holding in the McClanahan case supra in this language: "The decision in the McClanahan case, supra, must be distinguished. It was there held

that if the office was not kept open for the half hour, the carrier could not charge more than the regular fare, whether the passenger had gone to the office for a ticket during the half hour or not. But this was based on the imperative concluding language of the proviso, which does not apply here."

The language thus denominated "imperative" is the concluding words of article 4542, Sayles' Revised Statutes: "And upon failure to do so, they shall not charge more than three cents per mile." In view of the statutory provision referred to, and the construction placed upon same by the above decisions, we are of opinion that it makes no difference whether or not appellee applied for a ticket or used any diligence whatever in attempting to procure one within the half hour prior to the departure of the train. The ticket office not having been kept open half an hour prior to the departure of the train, as required by the law, the conductor had no authority to collect or demand of appellee more than three cents per mile fare. The keeping of the ticket office open half an hour prior to the departure of the train is a condition precedent to the authority to collect more than three cents per mile fare.

The charge of the trial court follows the doctrine laid down in the cases referred to, and is not subject to the criticism of appellant embraced in any of its assignments of error. Appellant not being authorized to demand of appellee more than three cents per mile fare, and the amount due at that rate to his destination having been tendered by appellee, his rights were the same as if he had purchased a ticket, and no duty rested upon him to get off the train at an intermediate station and purchase a ticket. (Missouri Pac. Ry. Co. v. Foreman, 73 Texas, 314.) Appellee being rightfully upon the train, and having tendered to appellant the lawful fare, appellant was under obligation to carry him to his destination, and a refusal to do so was a breach of this obligation which entitled appellee to damages, and appellee rested under no duty to pay the additional fare unlawfully demanded by the conductor, or to get off the train at the intermediate station and buy a ticket, in order to reduce the damages that might result from the breach by appellant of its obligation. (Texas & P. Ry. Co. v. Payne, 99 Texas, —; Gulf, C. & S. F. Ry. v. Halbrook, 12 Texas Civ. App., 481; St. Louis, A. & T. Ry. Co. v. Mackie, 71 Texas, 494; Central K. & B. Ry. Co. v. Strickland (Ga.), 16 S. E. Rep., 353; Cleveland, etc., Ry. Co. v. Beckett (Ind.), 39 N. E. Rep., 431; Ellsworth v. Chicago, B. & Q. Ry., 29 Law Rep. Ann., 175; Atchison T. & S. F. Ry. Co. v. Dickerson, 45 Pac. Rep., 978; Louisville, etc., Ry. Co. v. Wolfe, 27 N. E. Rep., 606; Lake E. & W. Ry. Co. v. Arnold, 34 N. E. Rep., 744; Pittsburg, etc., Ry. Co. v. Russ, 67 Fed. Rep., 664; Cowen v. Winters, 96 Fed. Rep., 932; New York L. E. & W. Ry. v. Winters, 143 U. S., 60; Lake E. & W. Ry. Co. v. Fix, 88 Ind., 381; Krueger v. Chicago, etc., Ry. Co., 68 Minn., 445; Wilsey v. Louisville & N. Ry. Co., 83 Ky., 511; 3 Thomp. on Neg., secs. 3201 to 3203.)

In our opinion the sound doctrine is that when the passenger is rightfully on the train he is entitled to assert the right to remain thereon until he is carried to his destination, and is justified in refusing to leave the train and may resist expulsion, without using violence, but in such a manner as to reasonably show that he is being removed against his

will, and may then recover damages for any increased injuries inflicted on him on account of his rightful refusal to leave the train and through or by his consequent expulsion.

We think the following language used in the opinion in the case of Railway Co. v. Arnold, supra, very pertinent to the subject under consideration. "We do not concur in the doctrine that it was the duty of the appellant to pay the extra fare demanded of him and afterwards settle the question in dispute with the company; nor do we think that his failure to do so can be considered in mitigation of damages. It is true, the amount demanded was trifling, but the principle involved was the same as if the sum demanded had been a large one. However much we may commend the conduct of that person who yields his rights to avoid a difficulty, it is nevertheless the privilege of every person to stand upon his strict legal rights, and the law does not require him to yield them to make concessions in order to avoid trouble. . . . If there was a doubt, it was as much a duty of appellant's agent to forego ejecting appellee as it was appellee's duty to pay the fare when demanded and continue his journey. Appellant chose to stand upon what it conceived to be its strict legal rights. It can not now be heard to complain if appellee chose to do the same. It comes with ill grace for the appellant, after it has pushed what it believed to be its rights to the last extremity, to say that because it offered to carry appellee if he would pay his fare the damages ought to be mitigated. . . . The appellee was placed in a very unpleasant position before the passengers on the train. By conduct, if not by words, he stood charged with an attempt to defraud the railroad company, and of endeavoring to ride from Noblesville to Indianapolis without paying the fare therefor. If he had paid the extra fare demanded, a legitimate inference might be drawn that he was guilty of the dishonesty attributed to him. Whether he should pay and stay on the train, or refuse to pay and suffer expulsion, was a matter which the law left to the sole discretion of appellee."

In our opinion the principle of law to be deduced from the authorities referred to is: It is proper to require due care on the part of a person to avoid increasing his own damages, but the reason of the principle ceases when the damage to be avoided is a voluntary injury threatened by the other party who claims the benefit of the doctrine; and, as stated by an eminent authority, for the carrier to say to a passenger: "You must submit to extortion in order to prevent me from assaulting you, else you will be deemed in law to have caused your own damage needlessly," is equivalent to an attempt by the carrier to profit by its own wrongful threats. It amounts to a claim for exemption from liability for an assault, because the wrongdoer first offered his victim a choice between assault and extortion.

The testimony to the effect that appellee tendered to the conductor the full amount of fare at three cents per mile from Santa Anna to Brownwood when the conductor demanded his fare between Stanta Anna and Bangs, is practically uncontroverted. But, if it be conceded that the testimony of the conductor conflicts with the testimony of appellee to this effect, his (the conductor's) testimony to the effect that he would not have received less than four cents per mile rendered proof of tender

unnecessary. Hence there was no error in the refusal by the court below of appellant's special charge number 2.

The paragraph of the charge of the court below complained of in appellant's fifteenth assignment of error was favorable to appellant; and therefore, it had no ground for complaint against same.

The amount of the judgment as reduced by the remittitur is not, in our opinion, excessive, and such amount is fully warranted by the evidence; and in our opinion the conduct of the jury complained of in appellant's twenty-fifth and twenty-sixth assignments or error does not constitute reversible error, especially in view of the remittitur.

In view of our holding that the appellant was not entitled to demand more than three cents per mile fare of appellee if its ticket office was not kept open half an hour prior to the departure of the train, and our finding that appellant's own testimony shows that the ticket office was not so kept open, appellant's assignments of error relating to the exclusion or admission of evidence becomes unimportant.

For reasons already stated, appellant's other assignments of error are overruled. There being no reversible error pointed out in the record, the judgment of the court below is affirmed.

Affirmed.

Writ of error refused.

HOUSTON COTTON OIL MILL & MANUFACTURING COMPANY v. J. M. BIBBY.

Decided May 2, 1906.

Sub-agent—Compensation.

When an agent, upon his own account, employs a sub-agent to assist him in his principal's business, the sub-agent must look to the agent and not the principal for compensation.

Appeal from the County Court of Smith. Tried below before Hon. S. A. Lindsey.

E. P. Price, for appellant.—In a case in which the principals are sued upon a contract which is signed by their agent, and which shows upon its face who are the parties thereto, the principals can not be bound thereby if, at the time the contract is entered into, all the parties thereto knew the agency of the signor; that is to say, if the principals be disclosed at the time the contract was entered into they can not be bound by any contract not executed in their name, but executed in the name of the agent. The presumption being that the parties knowing when the contract was entered into that it was made for the benefit of a third party, the writing shows that they elect to look to the agent for its performance, and parole evidence can not be admitted to vary the writing by showing that they did not so elect, and in this case appellee could not hold the appellant liable upon the contract sued on in this cause. Heffron v. Pollard, 73 Texas, 100.

An agent acting under a written contract of employment limiting and defining the scope of his employment and authority to act for his

principal, can not bind the principal by any act or declaration outside the scope of his employment or authority as contained in the written contract of employment, and one who claims under a contract executed by such agent is bound to know the agent's authority, unless he has been held out by his principals as having powers which have not, in fact, been conferred. Green v. Hugo, 81 Texas, 457.

D. M. Reedy, for appellee.

NEILL, ASSOCIATE JUSTICE.—This suit originated in the Justice's Court. It was brought there by appellee against appellant and D. A. Grigg to recover $169.85, alleged to be due upon a written contract averred to have been made by appellant in the name of D. A. Grigg with appellee by which the latter agreed to purchase cotton seed at the city of Tyler in the name of Grigg for the appellant, who, according to the allegations, in consideration of his services, agreed to pay him (Bibby) one dollar per ton for all the cotton seed purchased under such contract.

The appellant answered by a general denial and plea of *non est factum,* denying under oath the execution of the contract sued on, or that it was executed by its authority or was ever ratified.

The appellee dismissed his suit as to Grigg, and the trial in the Justice's Court having resulted in a judgment in favor of appellee an appeal was taken by the company to the County Court, where judgment was rendered against it again.

The evidence shows conclusively that Grigg, while appellant's agent to purchase cotton seed, had no authority whatever to employ any one else in behalf of the company to make such purchases, and that it was clearly beyond the scope of his apparent authority to make such contract of employment. It also shows beyond controversy that appellant never acquiesced in or ratified Grigg's employment of the appellee. The contract sued upon shows upon its face that it was entered into between Grigg and Bibby in their own names and in their own behalf, the appellant's name not being mentioned or in any way connected with it.

Upon no theory deducible from the evidence can the judgment be sustained, or the liability of the appellant established. For the rule is well settled that where an agent, having undertaken the performance of some duty to his principal, employs upon his own account a servant or subagent to assist him, the subagent must look to his immediate employer, the agent, and not the principal. (Mech. Ag., secs. 197, 690; Williams v. Moore, 24 Texas Civ. App., 404; National Cash Register Co. v. Hagan & Co., 83 S. W. Rep., 727.)

As the case was fully developed upon the trial in the court below, and it conclusively appearing from the evidence that the appellee was not entitled to recover anything, the judgment of the County Court is reversed and judgment is here rendered for the appellant.

Reversed and rendered.

H. T. LUTCHER ET AL. v. ETTA ALLEN ET AL.

Decided May 2, 1906.

1.—Judgment—Collateral Attack—Recitals—Record.

In a suit of trespass to try title the defendants claimed the land under and by virtue of a judgment *in personam* and by default against the ancestor of the plaintiffs, and an execution sale thereunder. The defendant in that suit was a nonresident and was served by publication. The judgment recited that "the defendant, though citation by publication has been duly and legally made upon him, failed to appear and answer in this behalf, but wholly made default." Held, the court properly permitted the plaintiffs for the purpose of showing the nullity of said judgment to introduce in evidence the petition in that case, wherein it was alleged that the defendant was a nonresident of this State and a resident of Louisiana; also the citation in which the sheriff was commanded to summon the defendant, who resided beyond the State, by publication; and the sheriff's return which showed citation by publication.

2.—Same.

When the judgment sets out the particular kind of citation made on a defendant, the record may be consulted to support or destroy the recital in the judgment.

3.—Record, Meaning of.

By the record, or judgment roll, which may be consulted in an attack upon a judgment, is meant, at least, the process filed in the suit, the judgment itself, and the pleadings of the parties.

4.—Limitation—Payment of Taxes.

The payment of taxes for any length of time would not, by itself, be sufficient to show such possession as to support a plea of limitation, nor even to raise a presumption of such possession.

5.—Judgment, When not an Estoppel.

Some years before the filing of this suit certain other of the heirs of the common ancestor brought suit for the same land, and judgment was rendered against them. Held, because the parties to this suit were neither parties nor privies to that suit, the judgment therein rendered was in no way binding on them.

6.—Void Judgment—Lapse of Time.

If a judgment is void at the time of its rendition no lapse of time, however great, would render it valid and binding.

ON REHEARING.

7.—Judgment—Collateral Attack.

Opinion reiterated. If the contention was correct that in a collateral attack on a personal judgment against a nonresident, only the recitals in the judgment could be looked to in ascertaining the residence of the defendant, then in but few cases could it be shown that the court had no jurisdiction and the judgment was a nullity, and this, although the averments of the petition, the recitals in the process, the officer's return, and other parts of the record showed that the defendant was a nonresident, and negatived the possibility of any but constructive service.

Appeal from the District Court of Newton County. Tried below before Hon. W. B. Powell.

Holland & Holland, for appellants.—A recitation of legal service of

citation in a judgment of a domestic court of general and competent jurisdiction, is conclusive as to such service and the fact of such service being had or its validity can not be questioned in a collateral proceeding. Treadway v. Eastburn, 57 Texas, 209; Heck v. Martin, 75 Texas, 472; Sloan v. Thompson, 4 Texas Civ. App., 425; Moore v. Perry, 35 S. W. Rep., 840; Gillon v. Wear, 28 S. W. Rep., 1015; Cooper v. Mayfield, 57 S. W. Rep., 50; Davis v. Robinson, 70 Texas, 397; Graham v. East Texas, etc., Co., 50 S. W. Rep., 580; Martin v. Burns, 80 Texas, 679; Buse v. Bartlett, 21 S. W. Rep., 53; Iams v. Root, 55 S. W. Rep., 413; Hardy v. Beaty, 84 Texas, 567; Fowler v. Simpson, 79 Texas, 615.

A judgment of a domestic court of competent jurisdiction reciting valid service by publication imports absolute verity and can not be collaterally attacked. Hardy v. Beaty, 84 Texas, 567; Stewart v. Anderson, 70 Texas, 590; Buse v. Bartlett, 21 S. W. Rep., 53.

The court erred in his fourth conclusion of law in holding that no title would pass to land by levy and sale thereof as the property of Oliver Sutton in Newton County by virtue of an execution issued against O. S. Sutton, because the middle initial of a man's name is not recognized in law and men of the same name are presumed to be the same man. English v. State, 30 Texas Crim. App., 471; McDonald v. Morgan, 27 Texas, 506.

Where a party to a judgment against him, with full knowledge of such judgment employs counsel and makes an effort to set it aside and takes active steps with reference thereto and afterwards permits such judgment to remain undisturbed for thirty years and other parties to acquire valuable property rights thereunder, he and his heirs are estopped to deny the validity of such judgment. Bomar v. Ft. Worth B. & L. Assn., 49 S. W. Rep., 914; Cleveland v. Heidenheimer, 44 S. W. Rep., 554; Bonner & Eddy, Receivers, v. Green, 6 Texas Civ. App., 99; Jackson v. West, 54 S. W. Rep., 298.

The payment of taxes is prima facie evidence of possession and where it has continued for the required length of time, in the absence of any other testimony weakening the prima facie case made, it will support the plea of limitation. Jackson v. Deslonde, 1 Posey U. C., 691; Glasscock v. Hughes, 55 Texas, 476.

Acquiescence by one joint tenant in a judgment rendered in a cause brought by the others against one adversely interested for ten years estops such party from claiming adversely to the judgment and is a ratification thereof. Musselman v. Strohl, 83 Texas, 480.

R. W. Caskey being the next friend of the plaintiff Etta Allen, she being a minor and being raised by him, is entitled to be deemed her full representative in a suit brought by him for the recovery of an interest in land claimed by her together with the other joint claimants against an adverse claimant thereof, insofar as to bind her interest under the decree rendered, although she is not a party in name to the suit. Miller v. Foster, 12 S. W. Rep., 122; Gunter v. Fox, 51 Texas, 383; McGee v. Romatka, 92 Texas, 42.

The court erred in holding that the judgment in the suit of Moody & Jamison against Sutton, introduced in evidence could be collaterally attacked and the authority and jurisdiction of the court to render same questioned in this cause, because said judgment was more than thirty

years old and power to render same would be presumed from lapse of time. Garner v. Lasker, 71 Texas, 436; Johnson v. Shaw, 41 Texas, 434; Johnson v. Timmons, 50 Texas, 534.

W. D. Gordon, for appellee.

FLY, ASSOCIATE JUSTICE.—This is an action of trespass to try title instituted by appellee and others against appellants. The parties claimed the land through a common source, Oliver Sutton, appellants through a sheriff's deed to the land, by virtue of an execution issued, in a case of Moody & Jamison v. O. S. Sutton, out of the District Court of Galveston County in 1875; and appellees claimed the land as the heirs of Oliver Sutton. The cause was tried by the court, without the aid of a jury, and it was adjudged that a portion of the plaintiffs be allowed to take a non-suit and that the appellees, Etta Allen and her husband, G. C. Allen, and W. D. Gordon and B. F. Larkin for himself, and as next friend of the minor heirs of Jennie Larkin, deceased, recover of appellants as follows: Etta Allen one-half of a certain 287 acres of land, and W. D. Gordon the other half, and B. F. Larkin for himself and the minors, one-fifth of a certain 28 acres of land.

The court found the following facts, which we adopt:

"1st. I find that Richard Williams sold and conveyed the land in controversy to J. R. Williams in 1848 and that J. R. Williams sold and conveyed said land to Oliver Sutton in the year 1860.

"2d. I find that Oliver Sutton and Henrietta Sutton were husband and wife. That Henrietta Sutton died in 1867 and Oliver Sutton died in 1883 in the State of Louisiana. I find from the partition suit between the heirs of Oliver Sutton and Henrietta Sutton, that they left surviving them eleven children, and by admission of counsel in case, I find that one of these children, namely, Mary, was not the child of Oliver Sutton, but was a child of Henrietta Sutton.

"3d. I find that as Henrietta Sutton died in 1867 and left surviving her ten children by Oliver Sutton, that they were husband and wife in 1860, when the land in controversy was conveyed to Oliver Sutton.

"4th. I find that W. S. Sutton was one of the children and heirs of said Oliver Sutton and wife; that said W. S. Sutton is dead and left surviving him as his only heir one child, Etta Sutton, who is the wife of G. C. Allen. I find that Oliver Sutton and wife left surviving them a daughter Elizabeth, now deceased, who left as her heirs five children, one of whom was Jennie Larkin, now deceased, who left surviving her, her husband, B. F. Larkin, and two minor children, ———Larkin and ———Larkin.

"5th. I find that in 1874 Moody and Jamison brought a personal action in the District Court of Galveston County, Texas, against one O. S. Sutton, alleging that he was a resident citizen of the State of Lousiana, residing in that State, and claiming a debt due by said O. S. Sutton on an account of $202 and asking that he be cited by publication to answer the same at the next term, being the fourth Monday in November, 1874, and that in pursuance thereof, citation by publication was regularly made for four weeks beginning August 1, 1874, in a newspaper published in Galveston County, citing said O. S. Sutton to

answer said suit, and at the next term of said court, after said service by publication was complete, a judgment by default was taken in said court against O. S. Sutton for $202 in favor of said Moody and Jamison.

"6th. I find that on the —— day of ——, 1875, an execution issued out of the District Court of Galveston County, by virtue of said judgment against O. S. Sutton, and that the land in controversy was, by virtue of said execution and judgment, levied upon and sold as the property of Oliver Sutton, and that said Moody and Jamison purchased said land under said execution sale for the sum of $200, and that the land sold amounted to 2,293 acres.

"7th. I find that during the year 1872 and for six years thereafter Oliver Sutton was a resident citizen of the State of Lousiana. That about the year 1878 he came into Texas and went west on a prospecting tour and afterwards returned to Louisiana and died.

"8th. I find that Oliver Sutton had no middle name and was not known or called O. S. Sutton.

"9th. I find that some time before said execution sale of said land, E. A. Cheatham and T. W. Ford, attorneys at law, presented an application to the district judge of Galveston County, praying on behalf of Oliver Sutton for a writ of injunction to restrain said execution sale, that the judge refused the writ, and that it was never filed, nor was any further action taken. The court from the facts is unable to say whether Oliver Sutton or R. O. Sutton or any one of his other sons employed said counsel to enjoin said sale.

"10th. I find that in 1887 the heirs of Henrietta and Oliver Sutton and their representatives brought a partition suit and partitioned the 2,293 acres of land on the R. Williams survey in controversy among themselves, including other lands of said estate, and that said 2,293 acres was partitioned and set apart to eight of said heirs and that three of them got their interest in the estate out of other tracts of land.

"11th. I find that the defendants Lutcher & Moore have paid the taxes on said land since 1894.

"12th. I find that the defendants deraign their title to said land from Oliver Sutton through a sheriff's deed made by C. A. Hancock, sheriff of Newton County, Texas, by virtue of an execution issued out of the District Court of Galveston County, Texas, against O. S. Sutton on a judgment rendered *in personam* obtained in said court against O. S. Sutton when Oliver Sutton was a resident citizen of the State of Lousiana.

"13th. I find that part of the heirs of Oliver Sutton and Henrietta Sutton brought suit in 1894 against E. S. Jamison for the land in controversy and judgment was rendered for defendant against said heirs who were parties to said suit, but that plaintiffs, to whom judgment is given in this cause, were not parties nor privies to said suit and judgment."

The judgment obtained by Moody & Jamison in Galveston County, Texas, against O. S. Sutton was by default and it is recited therein that "the defendant, though citation by publication has been duly and legally made upon him, failed to appear and answer in this behalf, but wholly made default." The court permitted appellees to introduce in evidence the petition in the case wherein it was alleged that O. S.

Sutton was "a nonresident of said State and resides in the State of Lousiana," and the citation, in which the sheriff was commanded to summon O. S. Sutton who resided beyond the State, by publication, and the return which showed citation by publication. Through the first, second and third assignments of error appellants attack the action of the court in permitting the petition and citation to be used in evidence as well as the testimony of Mrs. Clegg to the effect that O. S. Sutton lived in Lousiana at the time the judgment was obtained. The grounds of objection were, that an attempt was being made to collaterally attack a judgment, thirty years old by evidence aliunde the record.

So far as the petition, citation and return are concerned the court did not err in permitting them to be read in evidence. While it is true that all reasonable presumptions must be indulged in favor of the judgments of domestic courts, and that they can not be collaterally attacked when reciting valid service or when silent on the subject, yet it has never been held that they can not be attacked in a collateral proceeding if the judgment itself or the record shows that the court did not have jurisdiction. A void judgment can be attacked at any time and place. In the case of Treadway v. Eastburn, 57 Texas, 209, it is stated: "To determine, however, whether the record shows affirmatively that there has been proper service, the whole of it should be taken together. When thus considered, if that portion which relates to this question shows affirmatively such character of service as is not authorized by law, or such defective service that a judgment by default thereon would be void, and not voidable only, and the remainder of the record is silent upon this subject not showing any finding of the court from which it may be inferred that there was other service or an appearance, then this would be a case in which it affirmatively appears that the jurisdiction of the court had not attached." The rule, as stated, has never been questioned in Texas, but has been often approved. (Heck v. Martin, 75 Texas, 469; Fowler v. Simpson, 79 Texas, 611; Martin v. Burns, 80 Texas, 676; Hardy v. Beaty, 84 Texas, 562; Dunn v. Taylor, by this court and not yet published.)

In the cited case of Martin v. Burns, which is relied on by appellants, it is said: "Where the case is within the jurisdiction of the court and no fact appears affirmatively in the record sufficient to defeat the jurisdiction, evidence aliunde, even where the judgment is silent as to the process or its service, will not be heard to contradict the presumption of regularity or to establish a fact outside of the record for the purpose of showing that jurisdiction over the former did not in fact attach and thus impeach the judgment, if the judgment itself finds and recites a valid notice or citation and service that controls the balance of the record, otherwise if it recites an invalid citation, or names the precise character thereof." In other words that case holds that if the judgment in this case had recited that O. S. Sutton was duly and legally cited the balance of the record could not be consulted as to service, but if the judgment had been silent as to service, or if it recited an invalid citation, or the kind of citation, then the record could be used to support or destroy the judgment. While not committing this court to all the propositions made in the quotation, we think the last part of it is well supported by authority. In the case of Fowler v. Simpson, above cited,

the court went further and held that a judgment which recited due service was invalidated by the citation which showed that there had not been due service, the record excluding any presumption that other service was obtained.

It may be taken as established by the decisions of Texas, that when the judgment sets out the particular kind of citation made on a defendant that the record may be consulted to support or destroy the recital in the judgment. Then the question recurs what is the record that can be consulted? In the case of Dunn v. Taylor, above cited, this court said: "By the record or judgment roll, referred to as being proper to be considered in determining the validity of a judgment, is meant at least the process filed in the suit, the judgment itself and the pleadings of the parties." (Freeman Judg., sec. 75 et seq.; Black Judg., sec. 124.) In the case of Stegall v. Huff, 54 Texas, 193, the affidavit for citation was used to contradict the recitals in a judgment, and the Supreme Court affirmed the judgment. So in Fowler v. Simpson, herein cited, the citation was used, in a collateral attack, to contradict the recitals in the judgment.

We conclude that the petition and citation and return were properly admitted, but the evidence of Mrs. Clegg should have been excluded. The evidence was cumulative, however, of that shown by the allegations in the petition and is not ground for reversal, the cause having been tried without a jury. (Hill v. Smith, 6 Texas Civ. App., 312, 25 S. W. Rep., 1079.) Appellants are in no position to complain of the testimony of Mrs. Clegg, however, because they proved by T. T. Howard that Oliver Sutton moved to Louisiana in 1872, and returned to Texas in 1878, and then went back to Louisiana in 1880.

The judgment recited citation by publication, and the petition showed that the defendant therein resided in the State of Louisiana, and the process showed that he resided outside the State, and as the judgment was rendered at the first term of the court that it could have been rendered in a case where the defendant was cited by publication, and as there could have been no other process, it follows that the court had no jurisdiction to render the judgment and it was null and void. (Martin v. Burns, 80 Texas, 676; Pennoyer v. Neff, 95 U. S., 714.)

We think the court was justified in finding that Oliver Sutton and Henrietta Sutton were man and wife in 1860, when he acquired the land. It was immaterial, however, whether they were married in 1860 or not. They were man and wife when she died and the rights of appellees are not affected, whether the marriage existed in 1860 or not.

There is no merit in the sixth assignment of error and it is immaterial whether the court erred in concluding that Oliver Sutton was not bound by a judgment against O. S. Sutton. The judgment was void as to O. S. Sutton and could not, therefore, be valid as to Oliver Sutton. There was no testimony to show that O. S. Sutton was Oliver Sutton.

It was in evidence that an application for injunction, to restrain the sale of Oliver Sutton's land under the judgment against O. S. Sutton, was presented by a firm of lawyers to a district judge and the application was refused. The grounds of the application were that Oliver Sutton did not owe the debt for which the judgment was recovered, and had

not been served with citation and was a non-resident of Texas. There is certainly nothing in those facts that would estop the heirs of Oliver Sutton. No suit was instituted to set aside the judgment and the application for injunction was not filed. It was simply presented to the judge and was refused. It would take more than that to vitalize a void judgment.

There was no evidence of possession of the land by appellants and had it been conclusively shown, as it was not, that the taxes for eleven years had been paid on the land by appellants that fact would not raise a presumption of possession of the land. It is a fact known to every one that in the past thousands of acres of land in Texas have not been occupied by those paying taxes on them and the payment of taxes would not by itself be sufficient to show such possession as to support a plea of limitation.

Appellants claim that O. S. Sutton was the same with Oliver Sutton, and their title is through a sheriff's deed made to Oliver Sutton's land, and the latter was the ancestor of appellees, from whom they deraign title. It may be true, as found by the court that Oliver Sutton and O. S. Sutton are not the same persons, but that did not alter the fact that both parties are claiming from a common source, Oliver Sutton, because it was the land of the latter that was sold under execution.

Although appellees may have known that parties who owned a part of the Richard Williams survey had sued for their parts and failed in their suit, it is unreasonable to say that appellees are estopped from claiming their part of the land because they did not take action and show that they thought the judgment against the other owners was wrong.

Etta Allen was not a party to the suit brought by R. W. Caskey and others, and it can not be perceived on what basis the contention rests for holding her bound by such judgment. It is not shown what interest Caskey had in the land, but it does not appear that he prosecuted the suit as next friend of Etta Allen, and it will not be presumed that he did so because he was her grandfather. He was not her legal guardian and did not pretend to represent her in the suit.

Though hoary and "ancient as the sun" a void judgment would not be rendered thereby valid and binding, and the judgment of Moody and Jamison against O. S. Sutton, being void in its inception, was void thirty years thereafter.

There is no merit in any of the assignments of error and the judgment is therefore affirmed.

Affirmed.

ON MOTION FOR REHEARING.

It must be conceded by all that a personal judgment against a non-resident by default on constructive service is void. (Pennoyer v. Neff, 95 U. S., 714; Freeman v. Alderson, 119 U. S., 185; Scott v. Streepy, 73 Texas, 547; Bartlett v. Spicer, 75 N. Y., 528; McKinney v. Collins, 88 N. Y., 216.) It must be admitted that the judgment against O. S. Sutton was a personal one and that the property sold under the judgment was not attached nor in any way brought under the jurisdiction

of the court. The only ground of disagreement therefore, must be as to whether the judgment can be attacked collaterally by showing outside of the recitals of the judgment that at the time service was obtained and the judgment rendered, O. S. Sutton was a resident of the State of Louisiana.

It is the contention, strenuously urged in the motion for rehearing, that the recitals of the judgment alone can be looked to in ascertaining whether O. S. Sutton was a resident of Texas or not at the time the personal judgment was rendered against him and at the time service by publication was obtained. It is insisted that in all the decisions to the effect that the record can be consulted, in a collateral action, to test the validity, that all that is meant is that the judgment itself can be consulted and that if it carries nothing in its recitals evidencing its nullity it can not be impeached in any manner. If that proposition be sustained scarcely any personal judgment against a non-resident could be attacked in a collateral proceeding for not one in a thousand would carry evidence of its invalidity in its recitals. Personal judgments might be obtained at any time against nonresidents and if the judgments should recite that valid and legal service had been obtained as they usually do, they could never be questioned although the averments of the petitions, the recitals in the process, the return and other parts of the record showed that the defendants were nonresidents and negatived the possibility of any but constructive service. If the rule insisted on by appellants prevailed the opinion in the case of Pennoyer v. Neff could never have been written nor perhaps those in any of the numerous cases following that decision.

This matter has been adjudicated in this State directly against the contention of appellants. (Lumber Company v. Rhoades, 17 Texas Civ. App., 665.) The court in that case said: "Another illustration of the fallacy of the assumption that because the record establishes the regularity of the process by which jurisdiction of the party within the reach of the process of the court is obtained, it also establishes the fact that the party was alive, or in other words, that he was within the jurisdiction of the court, is shown by the decisions as to the effect of judgments against persons who are nonresidents of the State where the judgments are rendered. The process of the courts of the State can not reach beyond its territorial limits and bring before them persons from other jurisdictions. But if the judgment always conclusively proves jurisdiction over parties no evidence could be heard to show that a particular party was a nonresident unless the record should affirmatively show it. This was once held by many courts as the rule applicable to domestic judgments, but it can hardly be maintained that it is now the law. (Northcraft v. Oliver, 74 Texas, 167; Pennoyer v. Neff, 95 U. S., 732; Needham v. Thayer, 147 Mass., 536; Eliot v. McCormick, 144 Mass., 10.)" A writ of error was refused in the Rhoades case, by the Supreme Court.

In the case of Needham v. Thayer, 147 Mass., 536, 18 N. E., 429, cited in the Rhoades case, it was said: "The court has no jurisdiction, and its judgment has no force, either in the State in which it was rendered, or in any other State. This being so, the judgment can not be enforced by a suit upon it; and the nonresident defendant can not

be deprived of his right to show by plea and proof, if such suit is brought, that the judgment is void, without an abridgement of his privileges and immunities, to protect which was the object of the fourteenth article of amendment. To compel him to resort to our courts by a writ of error, in which he must file a bond if he would obtain a stay of the execution, is to impose a burden upon him, and thus to abridge his privileges and immunities. It has been held in many cases that a domestic judgment can not be impeached by plea and proof in a suit brought upon it, because the proper remedy is a writ of error. . . . But while a State may make laws binding its own citizens, requiring them to resort to a writ of error, it can not so bind citizens of other States." The Rhoades case, and those cited therein, are authority for the attack on personal judgments on nonresidents not only by use of the pleadings and citations in the cases but by evidence aliunde the record.

We desire to confine the scope of the rules stated in our former opinion to cases of the character now under consideration, and there can be no doubt in such cases that the pleadings and process can be used to collaterally attack the validity of a judgment. We have never for a moment doubted the correctness of that proposition and have written this opinion on rehearing merely because appellants have insisted so strenuously that there was no authority for it. The authority is ample and the proposition is sustained by reason, common sense and justice.

The motion for rehearing is overruled.

Overruled.

Writ of error refused.

A. G. COX ET AL. v. LIDA OLIVER.

Decided May 3, 1906.

1.—Special Judge—Election.

A special district judge may be elected on the first day of the term of court, when the regular judge is absent.

2.—District Court—Jurisdiction.

The District Court has jurisdiction of a suit by a surviving wife to recover possession of the homestead and other property of the deceased in which she has an interest, and of which she claims she was unlawfully dispossessed.

3.—Homestead—Payment of Purchase Money—Community Property.

Where a husband during the marriage purchased the homestead, paid part cash, and executed his notes for the balance of the purchase money, the fact that some of said notes were transferred to the wife and became her separate property, would not make the homestead her separate property, nor affect its character as community property.

4.—Homestead—Rights of Second Wife.

Upon the death of a wife, leaving children, the surviving husband is entitled to the exclusive possession of the community homestead so long as he chooses to occupy the same. Upon his death his second wife is entitled to possession of the same, subject to the right of the children by the first wife to jointly occupy the same with her, or to partition the same. If partitioned, the husband's half of such homestead should be awarded to such second wife for her exclusive use so long as she may elect to occupy it as a homestead. A guardian of the minor children of the first wife, if authorized by the Probate

Court, would have the right to occupy the undivided homestead jointly with the second wife. This right, however, would not extend to any member of the guardian's family.

5.—Personal Property—Same.

In the community personal property of the first marriage, a second wife and the children of the first marriage would be entitled in the proportion of five-sixths to the children and one-sixth to such wife, and until partitioned they would hold and enjoy the same in said proportions.

6.—Eviction—Damages—Evidence.

Evidence considered, and held insufficient to support the judgment for damages against defendants for an alleged unlawful eviction.

Appeal from the District Court of Shelby County. Tried below before Hon. E. A. McDowell, special judge.

E. B. Wheeler, for appellants.—The regular term of the District Court of Shelby County, Texas, being fixed by law to begin on the first Monday in January, 1905, and it being the 2d day of January, 1905, and the Hon. James I. Perkins being the regular judge of said District Court, and judge of the second judicial district of Texas and having the only and the exclusive right to open said court on the 2d day of January, 1905, and he evidently had all of said day to open said court, being the regular judge thereof, and the said J. I. Perkins, the regular judge of said court, failed to make his appearance and open said court on the 2d day of January, 1905, the election of the Hon. H. B. Short special judge of said court, by the practicing attorneys then in attendance on said court on the 2d day of January, 1905, was a nullity in law, and his acts as said special judge would not be binding on the rights of anybody, neither could he open said court for any purpose, and he assumed to act as such special judge until the 23d day of January, 1905, at which time he refused to further act as special judge of said court. Art. 1071, Rev. Civ. Stats. of Texas; Scott v. The State, 43 Texas Crim. App., 591; Wilson v. The State, 37 Texas Crim. App., 373; Campbell v. Chandler, 37 Texas, 32.

Plaintiff did not have the right by her marriage with A. M. Oliver to take possession of the land and personal property, the subject of this suit, and control the same and the said seven minor children, she having no interest in the property, only what she got by her marriage with A. M. Oliver and not being the guardian of the persons and estate of said children. Art. 2967, Revised Civil Statutes; Thos. A. Pressley Heirs v. Robinson, 57 Texas, 453; Crocker v. Crocker, 19 Texas Civil App., 297.

If plaintiff married A. M. Oliver and if the same be legal then all she would be entitled to according to her pleading and evidence would be one-third undivided interest for life of A. M. Oliver's interest in the land and one-third interest in the personal property of said A. M. Oliver, deceased, absolute, whatever that may be, and she would not have any right to the possession and control of the property, the subject of this suit, or the control and management of said seven children, not being their lawful guardian, she at best a stranger to them and their estate. Art. 6967, Rev. Stats. of Texas; Parker v. Fogarty, 23

S. W. Rep., 700; also 4 Texas Civ. App., 615; Goddard v. Reagan, 8 Texas Civ. App., 272.

The court erred in finding the property, the subject of this suit, was all community property of A. M. Oliver and S. S. Oliver, deceased, when the undisputed evidence of O. S. Cox, Dr. C. M. Carr and George Oliver shows unmistakably that the land was paid for by separate property of S. S. Oliver, deceased, except one hundred dollars which is uncertain as to it being the separate property of A. M. Oliver. The four eighty dollar notes was the separate property of the said S. S. Oliver, deceased, now the property of said minor children, the notes being given to S. S. Oliver by her father and mother as a part of their estate. Plaintiff's marriage, if lawful, could not avail plaintiff in any way as to the separate property of S. S. Oliver's estate. Cleveland v. Cole, 65 Texas, 402; Blair v. Findlay, 75 Texas, 210; Chapman v. Allen, 15 Texas, 278; Morrison v. Clark, 55 Texas, 437; Blum v. Rogers, 71 Texas, 668; Reynolds v. Lansford, 16 Texas, 288; Thos. A. Pressley Heirs v. Robinson, 57 Texas, 453.

The plaintiff could not have the exclusive right to possess or control said property as against the right of the children and their legal guardian, A. G. Cox, she could only claim a division of the property according to her interest in said property, if she had any. Putnam v. Young, 57 Texas, 461; Clift v. Kaufman, 60 Texas, 64; Hoffman v. Hoffman, 19 Texas, 196; Martin v. McAllister, 61 S. W. Rep., 522.

D. M. Short & Sons, for appellee.—The election of a special judge by the bar on the first day of the term is at most but an irregularity and in the event the regular judge does not appear on the first day and open court the election of special judge on said day instead of on the next day becomes immaterial. Porter v. State, 12 Texas Ct. Rep., 925.

The appellee being in lawful possession of the property by reason of being left at the head of the family of A. M. Oliver and said property being community property of A. M. Oliver and his first wife, said possession could not be disturbed by a stranger to the estate; and when disturbed whereby damage resulted to appellee, the District Court and not the Probate Court had jurisdiction of the matters in controversy. Sec. 8, art. 5, Constitution; Andrews v. Parker, 48 Texas, 94; Thurber v. Conners, 57 Texas, 96; McDanmell v. Cherry, 64 Texas, 177.

First counter proposition under third assignment of error.—Under the allegations in the appellee's petition which the court found to be true, she was entitled at the time A. G. Cox took possession of A. M. Oliver's property to its exclusive control and possession; and after A. G. Cox qualified as guardian of the children, she was entitled to one-half the rental value of the homestead, and to the possession of the personal property exempt to the head of the family, and in addition, she was entitled to be restored to the possession of all of the personal property left with her as the head of the family at the death of her husband, A. M. Oliver, the possession of which had been taken from her previously by force as shown by record. Sec. 52, art. 16, Constitution; Rev. Stats., art. 2049, 2062; Eubank v. Landram, 59 Texas, 247; Reed v. Talley, 13 Texas Civil App., 290.

REESE, ASSOCIATE JUSTICE.—Mrs. Lida Oliver brought this suit in the District Court against A. G. Cox, O. S. Cox and Mary Gunter, alleging in her petition, in substance, that she is the widow of A. M. Oliver, deceased, who died at his home in Shelby County, Texas, March 20, 1904, intestate, leaving the plaintiff, his widow, with whom he was living at the time of his death, and seven minor children by Oliver and a former wife now deceased. That deceased at his death was possessed, in his own right, of 80 acres of land, which was his homestead, and certain articles of personal property specifically described, which was all exempt from forced sale for debt; said property consists of household and kitchen furniture, cows, horses and such other property as would be found on a small farm. Among the articles of property described was $149.25 in cash. There is no administration upon the estate of said Oliver and no necessity therefor.

After her husband's death plaintiff continued with the children to occupy the homestead, and it was her intention to continue to do so and to use the personal property enumerated as a means of livelihood to maintain herself and said children.

It is alleged that while so in the occupation of said homestead, defendants entered into a conspiracy to compel plaintiff by force, threats and intimidation to leave the premises, and that in pursuance of this purpose, by the means aforesaid, they did compel her to abandon the premises and the property aforesaid, and to seek safety from violence at the hands of defendants under the protection of strangers, whereby she suffered much mental distress and humiliation, for which she claims actual damages in the sum of $10,000.

It is alleged that the value of the use of the property, real and personal, was $25 per month.

Plaintiff prays for judgment for the property, real and personal, or the value of such of the personal property as is not forthcoming, for the value of the use thereof, and damages as stated. The petition was filed June 25, 1904.

A. G. Cox (otherwise named in the petition as Brown Cox) answered that he was on July —, 1904, duly appointed by the Probate Court of Shelby County receiver of the estate of said minor children and qualified as such by making oath and giving bond, and was afterwards duly appointed and qualified as their guardian, he being an uncle of the children, whose deceased mother was his sister, and that he claimed no interest in the property on his own account, but had gone on the place for the purpose of cultivating the farm so as to make a living for the children, and under the orders of the Probate Court authorizing him to do so. He denies all charges of conspiracy, violence or intimidation made against him.

Defendant O. S. Cox denies generally the allegations of the petition, and pleads that he has no claim whatever upon any of the property described in the petition and that he has never at any time controlled or attempted to control the same.

Mary Gunter was dismissed from the suit by plaintiff; and on trial without a jury judgment was rendered for plaintiff against defendants A. G. Cox and O. S. Cox for the property described in the petition, or

the value of such of the personal property as could not be found, and in addition for one hundred dollars, as one-half of the reasonable annual rental value of the property, real and personal, and one thousand dollars exemplary damages, from which judgment defendants appeal. The judgment of the court embraces also the court's findings of fact.

It is not necessary to a disposition of this appeal to discuss all of the assignments of error presented by appellants, and we shall not undertake to do so further than may appear necessary for the guidance of the court upon another trial.

The objections to the trial of the case by the special judge are not well taken. The regular district judge not appearing to hold the court on the first day of the term, it was lawful for the attorneys in attendance to proceed to the election of a special judge. The statute authorizing this proceeding does not require that this shall not be done until the second or any succeeding day, but only that "whenever, on the day appointed for a term of the court" the judge thereof shall be absent, the practicing lawyers of the court present may proceed to elect a special judge (Art. 1071 Rev. Stats.). It appears that the special judge so elected on the first day of the term, after serving for a part of the term, resigned, and on the twenty-first day of the term, the regular judge being still absent, another special judge was duly elected by whom this case was tried. Such special judge was authorized to hold the balance of the term and transact the business of the court. The regularity of his election is not otherwise assailed than as herein indicated.

There is no merit in appellants' contention that the District Court had no jurisdiction to adjudicate the matters involved in the petition, but that jurisdiction was in the Probate Court.

The court finds that all of the property described in plaintiff's petition is community property of the deceased A. M. Oliver and his first wife, S. S. Oliver, mother of the children referred to in plaintiff's petition, and this finding is assailed so far as the real estate constituting the homestead is concerned, defendants contending that this is the separate property of the first wife. This contention is based upon the fact that although the property was bought by A. M. Oliver during the first marriage, he only paid in cash $100 of the purchase money of $420, and that the four promissory notes of $80 each, given by him for the balance of the purchase money, were taken up by the father of the deceased wife, and two of them were given to his daughter as her share of her father's estate. It does not clearly appear what has become of these notes, nor of the other two of the four notes given. At any rate, the fact that these notes became the separate estate of the deceased wife would not affect the character of the land as being community property. If they are still enforceable and not barred by limitation they would constitute a valid claim in the hands of the children, to whom they belong, against the estate, and a lien on the land, but not enforceable in this suit.

Being community property of A. M. Oliver and his first wife, and the land constituting the homestead, the title to one-half thereof, upon the death of the first wife, descended to, and became vested in, the children of such first marriage, but was not subject to partition during the life of the father or so long as he should choose to use or occupy the

same as a homestead. (Const., art. 16, sec. 52.) Upon the death of the father the property became subject to be partitioned, as between the children of the first marriage and the plaintiff, whereby the one-half inherited by them from their mother may be set apart to them. In the other half, however, being the father's share of the community, upon such partition, the plaintiff would still have her right of homestead so long as she might elect to use and occupy it as such. In addition to her homestead right in this half, she owns by inheritance from her husband a life estate in one-third thereof, with remainder to the children of the first marriage, who take also the other two-thirds absolutely, but this half is not subject to partition between plaintiff and the children so long as plaintiff may elect to use or occupy it as a homestead. (Pressley v. Robinson, 57 Texas, 453; Gilliam v. Null, 58 Texas, 304.) The land constituting the homestead, however, not having been partitioned, plaintiff had a right to occupy the homestead as it was, embracing the entire tract, in conjunction with the children who had an equal right. A. G. Cox in his individual right had no legal right of occupancy of this homestead, and although it appears that his motive in going and remaining upon it was, so far as the evidence shows, entirely disinterested and for the purpose of taking care of his mother, a constituent of the family at the death of A. M. Oliver, and the children of his deceased sister, he had no legal right to do so against the objection of plaintiff who was the head of the family, at least until he was appointed guardian of the children. He quite candidly admits that he took charge of things generally and proceeded to cultivate the farm, without consulting plaintiff, and practically ignored her rights as head of the family and her objections to his remaining upon the place. He does not appear to have done more than this, or to have denied, or attempted to interfere with, her right also to the use and occupancy of the homestead as one of the family. We do not think that her right, in the circumstances, can be limited to a mere right of occupancy as a member of the family, or that the acts of A. G. Cox, according to his own admissions, did not constitute such an interference with her rights, as to authorize this suit on plaintiff's part to be reinstated in her right, not only to occupy the homestead as a member of the family, but to recover the possession thereof. (Art. 2049, subdivision (4), Rev. Stats.) This would be the condition at the time appellee left the premises. The rights of A. G. Cox as guardian of the persons and estates of the children, however, are different. The children being the owners in fee of the entire property subject only to the life estate of appellee in one-sixth of it and her homestead right in an undivided one-half, we think that the guardian of the persons and estate of the children, if so authorized by the Probate Court, would have a right to occupy the undivided homestead jointly with appellee. This right would not extend, however, to any members of his family if there are such.

So far as the personal property is concerned, which is all community property of Oliver and his first wife according to the finding of the trial court, following by analagy the rule laid down for the disposition of the same in case of administration upon the estate, the children and appellee being entitled thereto in the proportion of five-sixth to the children and one-sixth to the appellee, and the guardian being entitled

to have the share of the children delivered to him, appellee would not now be entitled to judgment for more than her proportionate share of it, or to be restored to the proportionate use and enjoyment thereof, jointly with the guardian acting for and in the interest of his wards, until partition of the same.

If appellee is entitled to damages by way of the rental value, or the value of the use and enjoyment of the homestead, by reason of having been compelled by appellant A. G. Cox to leave the premises, the measure of her actual damages would be the half of such rental value of the homestead, and the value of the use and enjoyment of one-sixth of the exempt personal property during the time she was deprived thereof by appellant A. G. Cox, if in fact she has been so deprived.

The court rendered judgment against both A. G. Cox and O. S. Cox for all of the property and for $100 actual and $1,000 exemplary damages, upon the theory that there was a conspiracy between them to compel appellee to leave the premises by intimidation and threats of violence.

We can find no evidence in the record of such a conspiracy. The judgment against O. S. Cox for anything is without any evidence whatever to support it. The sum total of his offending appears to have been that previous to the death of A. M. Oliver, with whom he had not been on good terms, he wrote to his brother, A. G. Cox, who lived in Louisiana, and who appears not to be encumbered with any family of his own, and informed him that Oliver was about to die, and suggested or requested that he come to Texas and take charge of the place and act as guardian of the children and care for their mother who was a member of the family at the time of Oliver's death, and that he further, when A. G. Cox went back to Louisiana for his household effects, sent a negro over to the place to plough the crop for two days for which he paid out of his own pocket. He testifies very candidly and evidently with sincerity that he and Oliver had had nothing to do with each other for some time before Oliver's death; that he had heard that Oliver did not desire him to have anything to do with his affairs after his death, and that he himself had as little desire in that direction as Oliver.

The judgment for exemplary damages against A. G. Cox is likewise without evidence to support it. His conduct shows at the most want of sufficient regard for appellee's rights as head of the family in the absence of a legal guardian of the children, and a disposition to manage things without consulting her. He should not have established himself in the house against her wishes, but she testifies herself that neither A. G. Cox nor O. S. Cox ever at any time said anything out of the way to her; that neither of them ever told her to leave the place or objected to her coming back. Neither of them had anything to do with the episode of the claw-hammer, or the fight or fracas between appellee and Francis Oliver, which appears to have been the immediate cause of appellee's leaving the place, nor with the talk of the women in the neighborhood to the effect that she ought to be taken out and whipped. There is nothing in the evidence that can furnish even a well grounded suspicion that either A. G. or O. S. Cox had any connection with either of these offenses against appellee.

The testimony of Ellison and Powdrell relating to these occurrences

as set out in the thirteenth and fourteenth assignments of error, and of Drury Field, as pointed out in the fifteenth assignment, should not have been admitted over the objection of appellants. The evidence shows no liability on the part of O. S. Cox of any kind, and no liability on the part of A. G. Cox for exemplary damages.

If upon another trial it be found that A. G. Cox is liable at all, in determining the rights of appellant to the use and occupancy of the homestead and the use of the exempt personal property and her damages for being deprived of such use due regard should be had to the rights of the children and of A. G. Cox as their guardian as herein suggested.

For the errors indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

C. J. TORNO v. J. E. TORNO ET AL.

Decided May 4, 1906.

Devise—Acceptance—Estoppel.

One who takes property under a will is estopped from claiming, adversely to the provisions of such will, other property therein devised to another.

Appeal from the District Court of Washington County. Tried below before Hon. Ed. R. Sinks.

W. L. Eason, for appellant.—That the facts do not show that plaintiff accepted under his father's will, and do not constitute an estoppel, cited: Steed v. Petty, 65 Texas, 495; Mortgage Co. v. Norton, 71 Texas, 689; Grinnan v. Dean, 62 Texas, 220; Burleson v. Burleson, 28 Texas, 415; Scoby v. Sweatt, 28 Texas, 730; Masterson v. Little, 75 Texas, 698.

That plaintiff was entitled to one-fourth in value, and not merely in acres, of his mother's estate, and the court, by its judgment, usurped the functions of commissioners provided by law to partition land, cited: Reed v. Howard, 71 Texas, 205; Tiernan v. Baker, 63 Texas, 644; Heusel v. Sturn, 25 S. W. Rep., 818; Freeman v. Preston, 29 S. W. Rep., 497; 92 Texas, 683; 91 Texas, 162.

Searcy & Searcy, for appellees and intervenors.—A party can not accept and claim property under a will, and afterwards assert rights in conflict with the provisions of said will. Paschal v. Acklin, 27 Texas, 195; Little v. Birdwell, 27 Texas, 691.

PLEASANTS, ASSOCIATE JUSTICE.—This suit was brought by appellant against the appellees J. E. Torno, Robert E. Torno and Emma Torno, for partition of three tracts of land in Washington County. The three tracts are fully described in plaintiff's petition, which alleges that plaintiff is the owner of an undivided one-fourth of said land, and prays that his title thereto be established, and that the lands be equitably partitioned between plaintiff and defendants.

The defendants answered by general demurrer and general denial, and by special plea in which it is averred, in substance, that Chas. Torno,

deceased, who was the father of plaintiff and defendants, by his last will devised to plaintiff a tract of 37½ acres of land out of the first tract described in plaintiff's petition, which contained 130 acres and was the community property of said Chas. Torno and plaintiff's deceased mother; that by the expressed provision of said will the 37½ acre tract was devised to plaintiff in full settlement of his interest in his mother's estate; that said will was duly probated, and thereafter the firm of Thos. Watson & Co., who held a judgment against plaintiff, levied upon and sold the 37½ acre tract in satisfaction of said judgment, and at such sale became the purchasers of the land; that soon after said sale and purchase by Watson & Co., the plaintiff repurchased the land from them, thereby recognizing their title to the same and accepting the terms and provisions of his father's will, and by so doing is now estopped from asserting any interest or claim as heir of his mother in the remainder of said 130 acre tract.

Thos. Watson & Co. intervened in the suit alleging the purchase of the 37½ acre tract at execution sale and the conveyance by them to plaintiff as set out in defendants' answer, and further alleging that in part payment of the purchase money for said land plaintiff executed his note to the intervenors secured by a vendor's lien upon the land; that said note was not paid at maturity and intervenors foreclosed their lien for the amount due them and at a sale under the judgment of foreclosure again purchased the land and are now the owners thereof.

The trial in the court below without a jury resulted in a judgment in favor of the defendants and intervenors.

The facts disclosed by the record are these:

Plaintiff and defendant J. E. Torno are children of Chas. Torno and his first wife, both of whom are deceased. After the death of plaintiff's mother his father married again and the remaining defendants are children of the second marriage.

The 130 acre tract of land described in plaintiff's petition was community property of his father and mother, and the other two tracts, of 36 and 6 acres respectively, were community property of the father and his second wife.

Plaintiff's father died in 1901 leaving a will which was duly probated. By this will a tract of 37½ acres, out of said 130 acre tract, was devised to plaintiff, and the remainder of the testator's property was given to the defendants. The 37½ acres devised to plaintiff is described in the will by metes and bounds, and is devised to him as his share of his mother's estate, this intention of the testator being expressed in the following unequivocal language: "The 37½ acres is given to him, C. J. Torno, in full settlement of his claim against his deceased mother."

When this will was read in the presence of the plaintiff and the defendants, a few days after their father's death, plaintiff expressed his dissatisfaction therewith, and his determination not to accept the 37½ acres as his portion of his mother's estate.

Some time after the probate of the will the intervenors, who held a judgment against plaintiff which had been properly recorded in Washington County and a lien thereby created upon any land then owned or thereafter acquired by plaintiff in said county, levied upon the 37½ acre tract under an execution issued on said judgment, and at the sale

under said execution became the purchaser of the land. Plaintiff then consulted a lawyer in regard to bringing suit to recover his interest in his mother's estate in the 130 acre tract, and was advised to buy the 37½ acres from intervenors before bringing the suit. Acting upon this advice he purchased the 37½ acre tract from intervenors for the amount of the judgment held by them and the cost of the execution sale. Of this amount he paid the intervenor $75 in cash and for the balance executed his note secured by a vendor's lien on the land. When this sale was made to plaintiff by the intervenors they released their judgment and the judgment lien. This note was not paid at maturity and intervenors brought suit thereon, foreclosed their lien and at a sale under said judgment of foreclosure purchased the land and obtained a sheriff's deed therefor.

Upon these facts the trial court held that in purchasing the land from the intervenors plaintiff recognized their title thereto, and thereby accepted under his father's will, and is estopped from asserting any claim to the remainder of the 130 acres as heir of his mother.

We think this conclusion is sound. It is unnecessary to cite authority upon the proposition that one who takes property under a will can not claim, adversely to the provisions of such will, other property therein devised to another.

Plaintiff may have, as he testified, told the intervenors when he purchased the 37½ acres from them that he did not intend to accept under his father's will, and intended to sue for his portion of his mother's estate; but he accepted a deed from them for the entire 37½ acres and executed his note for a portion of the purchase money in which he acknowledged a vendor's lien upon the whole tract. By so doing he recognized the intervenors' title to the whole of the tract, or, at least, their right to subject it to the payment of the judgment held by them against him, and having failed to pay the note when it became due the foreclosure of their lien and the purchase by intervenors at the sale under such foreclosure invested them with the title to the land. Having thus by his acts placed the title to the 37½ acres in the intervenors in satisfaction of a debt due by him he will not be heard to say as against the defendants that he has not accepted under his father's will.

It matters not what his intention may have been, when he placed it in the power of the intervenor to obtain the title to the 37½ acres in satisfaction of his indebtedness to them and by failing to discharge such indebtedness permitted them to acquire title to the land, he thereby appropriated it and is estopped from claiming that he did not accept under the will.

We are of opinion that the judgment of the court below should be affirmed and it has been so ordered.

Affirmed.

Writ of error refused.

E. V. ZOLLARS ET AL. v. SNYDER AND LACEY.

Decided May 5, 1906.

1.—Filing of Pleadings—Discretion of Court.

Where an answer setting up a meritorious defense had been prepared by counsel for defendants and shown to counsel for the plaintiffs several days before the case was called for trial but was not actually filed until that time, and was then filed without protest or objection on the part of counsel for plaintiffs, and where counsel for plaintiffs upon the filing of such answer exhibited for the first time and filed a supplemental petition containing new matter and which necessitated a continuance of the case by the defendants, it was error for the court of its own motion to strike out the answer of the defendants, and force them into trial merely because the replication of the plaintiff's operated as a surprise and necessitated a continuance of the case.

2.—Mechanic's Lien—"Extras."

A mechanic's lien exists as security for "extras" supplied under the terms of the contract, and this, even after full payment of the original contract price, exclusive of such "extras."

Appeal from the District Court of Deaf Smith County. Tried below before Hon. Ira. Webster.

Jno. P. Slaton and *J. E. Lancaster,* for appellants.

Wm. J. Berne, for appellees.

SPEER, ASSOCIATE JUSTICE.—Snyder and Lacey instituted this suit against Add-Ran College and other defendants as trustees to recover a balance alleged to be due upon a building contract and to foreclose a mechanic's lien on a certain college building in the town of Hereford, Deaf Smith County. From a judgment in favor of the plaintiffs in the sum of $1,057.43, with a foreclosure of lien, the defendants have appealed.

It appears that when this case was reached for trial on Tuesday, August 29, 1905, the parties announced ready for trial on the law, and the defendants presented their demurrers, a part of which were sustained, and the plaintiffs were permitted to amend their petition by inserting the necessary allegations to meet these demurrers. It was then noticed that the defendants' answer to the merits had not been actually attached to the exceptions and general denial, as it had been previously, on August 24, agreed by counsel for both parties that it should be, and by consent of plaintiffs' the same was then attached to the formal answer which had been filed on appearance day, August 15, whereupon plaintiffs announced ready for trial on the merits and at the same time handed to defendants' counsel a first supplemental petition, which had just been filed and which defendants' counsel had never seen, and the defendants' counsel then requested the court to grant them time to read the supplemental petition, and after reading the same they announced to the court that it contained new matter which operated as a surprise to defendants and asked that the cause be continued or that the said pleading be stricken out. The defendants' motion for a continuance was overruled and they prepared and filed a first supplemental answer in

response to the pleadings of plaintiffs last filed. The court then denounced the practice of filing new pleadings on the eve of trial and stated that he felt like it was his duty to strike out all pleadings in the case filed since appearance day, which he proceeded to do. On the next morning, August 30, the court called the case for trial, the plaintiffs announced ready and the defendants announced not ready because of the rulings of the court on the previous day, but the court forced them into trial over their objections. It also appears that counsel for plaintiffs had been furnished with a copy of the defendants' pleadings filed August 29, on August 24, and agreed that same should be attached to the original answer filed on appearance day, and never at any time made any objections to the filing of same. Under these circumstances we think the court erred when he struck from the files appellants' answer setting forth a meritorious defense to appellees' cause of action. It may be and often is a source of annoyance to trial courts for parties to defer until the case is called for trial the filing of their amendments, resulting as it often does in a continuance for the term, yet in a case like the present, where the amendment has been filed in such manner as not to operate a surprise to the opposite party, and there is no objection to its filing, it is improper for the court of its own motion to strike the same from the files merely because the replication of the opposite party operates as a surprise and continuance of the case. See Hobbs v. First Nat. Bank, 15 Texas Civ. App., 398, and authorities there cited. For this error the judgment is reversed and the cause remanded for another trial.

Appellants insist that the instrument purporting to be a mechanic's lien in favor of appellees was improperly admitted in evidence, because the same shows a balance due on account, and also shows payment of a sum in excess of the price mentioned in the original contract. But this objection is clearly without merit, since the lien exists as a security for "extras" supplied under the terms of the contract, even after full payment of the original contract price independent of such "extras."

No other question is presented that could arise upon another trial, and the other assignments are therefore overruled without discussion.

Reversed and remanded.

Texas and Pacific Railway Company v. D. H. Lynch.

Decided May 5, 1906.

Drover's Pass—Article 331a, Rev. Stats., 1895, Construed.

A railroad company contracted with plaintiff in the usual form to transport one carload of horses and the person in charge thereof from S., a station upon its line to its terminus, the same being a junction point with the defendant company; the horses were consigned to the plaintiff at T., a station upon defendant's road; the agent at S. issued a through waybill, showing the shipment to be from S. to T. via defendant's road; the shipping contract entitled the person accompanying the stock to return transportation to S. Evidence considered, and held sufficient to show that the defendant company, under the operation of art. 331a, Rev. Stats. of 1895, acted upon, ratified and made its own for all purposes the contract made by the initial carrier, and the person in charge of said horses was entitled to return passage over defendant's road.

Appeal from the District Court of Wichita County. Tried below before Hon. A. H. Carrigan.

W. L. Hall and *Spoont, Thompson & Barwise,* for appellant.

Montgomery & Hughes, for appellee.

CONNER, CHIEF JUSTICE.—For the third time this case appears before us on appeal from judgments in favor of appellee upon his claim for damages because of the ejection of his person from a passenger train near Texarkana, Texas. See 7 Texas Ct. Rep., 27, and 13 Texas Ct. Rep., 229. So far as it is deemed necessary to here state, the facts show that on December 11, 1901, the Fort Worth and Denver City Railway Company, in the usual form of live stock shipping agreements, contracted with appellee to transport one carload of horses and the person in charge thereof from Seymour, Texas, to Fort Worth, Texas. The horses, on the face of the contract, were consigned to appellee at Texarkana. The agent at the same time issued what is termed a through waybill showing the shipment to be "from Seymour, Texas, to Texarkana, Texas, via Fort Worth T. & P." The contract also entitled the person accompanying the stock to transportation in returning to the initial point of shipment upon presentation of "return transportation request issued with the contract." Appellee accompanied his horses and upon arrival in Fort Worth they were unloaded and fed in the yards of the appellant company, which afterwards reloaded and transported them, together with appellee, to Texarkana. No new contract was executed at Fort Worth and appellee testified that no request therefor was made. Appellee further testified that one of appellant's agents at Fort Worth notified him of the hour when the shipment from that point would begin, and that when called upon, while in the yards at Fort Worth, by the conductor of the train to produce his shipping contract, the one issued at Seymour was exhibited by appellee, to which the conductor replied that it was all right, and he and his horses were thereupon and thereafter transported without objection. The evidence further shows that the through freight charges from Seymour to Texarkana, together with the charge for feeding at Fort Worth were paid by appellee to appellant's agent at Texarkana. As on former trials, it was further shown that when ready to return appellee presented himself to appellant's agent at Texarkana, with whom he was personally acquainted, and inquired "Where is the man that fixes up my contract?"; that he was referred to a young man sitting at a desk, to whom the contract under consideration was handed, accompanied by appellee's statement that he "wanted" him "to fix this contract up to get back to Fort Worth;" that this young man examined, stamped and returned the contract, stating that it was "all right;" that such evidence of appellee's right to ride was not recognized by the conductor of the returning train and appellee was ejected under circumstances substantially as stated in our former opinion. On the last trial, however, it was further shown that appellee on several former occasions had been permitted to return over appellant's line from Texarkana to Fort Worth, on presentation of the same kind of contract as the one in question, after being stamped as had been

done in this instance, although such seems not to have been in accord with the general rule adopted by the appellant company.

Numerous assignments of error are now urged, but we think most, if not all material questions thereby presented have been decided by us on former appeals adversely to appellant's contentions, and that therefore we can dispose of the present appeal very briefly and in general terms. We conclude that the evidence is sufficient to establish the alleged fact that appellant, under the operation of Revised Statutes, article 331a, acted upon, ratified, and made its own for all purposes of the shipment, the original contract made by the Fort Worth and Denver City Railway Company at Seymour. See Texas & P. Ry. Co. v. Lynch, 7 Texas Ct. Rep., 29; Texas & P. Ry. Co. v. Randle, 44 S. W. Rep., 603; Delaware, L. & W. Ry. Co. v. Ashley, 67 Fed. Rep., 212. If so, appellant became thereby obligated to return appellee from Texarkana to Fort Worth upon compliance with such reasonable regulations as related to that subject. This too, irrespective of the contractural obligation, became the duty of appellant by virtue of section 3 of Commodity Tariff No. 8-A of the Railroad Commission of Texas, shown in evidence, to the effect that in shipments of live stock between points in this State, one man in charge of a single car of horses should be passed each way.

The contention pressed upon us with greatest insistence, however, is to the effect that the evidence of appellee's right to return—the stamped Fort Worth & Denver City contract—was not such as was required either by the contract or by the regulations of the appellant company, and that therefore appellant's conductor was authorized to eject appellee. The regulation of the Fort Worth and Denver required appellee to present to its agent at Fort Worth the request for return transportation attached to the contract. It is evident that this was inapplicable to request for return transportation at Texarkana and could hardly have been in contemplation on appellant's part in continuing the shipment as it did from Fort Worth. The regulation of the appellant company applicable to live stock shipments made by virtue of its own contracts was for the person who accompanied the stock to present the contract to the agent at destination, who was directed to require the shipper to sign the "drover's pass" endorsed upon the back of the contract as a means of enabling conductors to whom it should be presented to identify the shipper. These regulations also seem inapplicable to this case, for here the shipment from Fort Worth was made without requiring the execution of one of appellant's contracts. If appellant had formulated or promulgated a rule that strictly applies to shipments of the character in question, it is not noted in its brief, or if so, we have overlooked it. Appellee testified, as before stated, that on several former occasions he had made shipments as in this instance, and that his Fort Worth and Denver City contract, stamped by appellant's agent at Texarkana as in the case before us, had been acted upon and recognized by appellant's conductors as entitling appellee to return passage to Fort Worth. This evidence may be said to tend to show the customary manner of furnishing shippers evidence of right to return passage recognized or adopted by appellant's agent at Texarkana in shipments made under contracts of other lines of railway; but whether so or not, appellee testified that

he was without knowledge that other evidence of right was required. It is evident that appellant's terminal agent was clothed with at least the apparent authority to require of appellee the performance of such acts as necessary to entitle him to return passage and to furnish appellee with the proper evidence of his right to such return. Appellee's identity was known to appellant's agent at Texarkana and his evidence shows that he in good faith presented to the conductor who ejected him the evidence of his right as a passenger that had been furnished for that purpose by the agent. Such conductor for aught that appears, could easily have ascertained the fact of appellee's identity—the end and aim of the regulations so greatly emphasized—and, as held by us on former appeals, in the absence of a different regulation to appellee that applied to this character of shipment, we think he was lawfully upon appellant's train, and that his ejection was wrongful, notwithstanding the fact that appellant's conductor may have been acting in good faith in the discharge of appellant's regulations governing his action. See Ft. Worth & R. G. Ry. Co. v. Jones, 85 S. W. Rep., 38, and authorities therein cited.

We conclude that the evidence supports the material allegations of appellee's petition; that all assignments of error should be overruled and the judgment affirmed.

Affirmed.

Writ of error refused.

J. R. WEBB v. JACOB LYERLA, JR.

Decided May 5, 1906.

1.—Limitation—Ten Years—Claim of Right.

The actual possession of a small part of a large tract of land without claim of right to the entire tract will not support the plea of ten years' limitation as to the entire tract.

2.—Same—Rendition for Taxes—Evidence.

An inventory of property rendered for taxation during the period of limitation not containing the land claimed is admissible in evidence as a circumstance tending to show that the party pleading the statute did not claim the land at that time.

3.—Same—Same.

Although a rendition of property for taxation is in the handwriting of the tax assessor and not of the party rendering the property, still when it comes from the custody of such assessor the presumption of regularity of official conduct makes it competent evidence.

Appeal from the District Court of Eastland County. Tried below before Hon. J. H. Calhoun.

D. G. Hunt and *Earl Conner,* for appellant.

J. R. Stubblefield and *Cobbs & Hildebrand,* for appellee.

SPEER, ASSOCIATE JUSTICE.—This suit was originally brought by Jacob Lyerla, Jr., against J. R. Webb and the heirs of A. Warner to

recover the southwest one-fourth of section number 41, block number 2. H. & T. C. Railway Company survey in Eastland County. Those of the defendants who answered pleaded the general issue, not guilty, and specially the statute of ten years limitations, and other special pleadings not necessary to mention. The defendant Webb filed a disclaimer as to the north eighty acres of the lands sued for. The trial resulted in a verdict for the plaintiffs for all the land except six and one-half acres, which the jury gave to the defendant Webb, evidently upon his plea of limitations. The defendant Webb has appealed.

It is first complained that the trial court erred in instructing the jury that the deeds and other muniments of title introduced in evidence by the appellee were sufficient to show title to the land in controversy in him, and that he was therefore entitled to recover, unless defeated by appellant's plea of ten years limitation. But in what respect the muniments of appellee's title are defective, appellant has failed to inform us, and our examination of the numerous papers constituting his title leads us to the conclusion that he has shown a complete chain of consecutive transfers from the sovereignty of the soil down to himself, which, of course, was sufficient to authorize the charge complained of.

It is next insisted that the court erred in instructing the jury that if A. Warner, under whom appellant claims, "did enclose a small portion of the said eighty acres of land and did adversely, under claim of right, assert possession of all of said eighty acres of land, did peaceably hold, occupy and use all of said eighty acres of land, adversely, and with his wife and children did hold such peaceable and adverse possession of the same for a period of ten consecutive years next before the institution of this suit, whether it was all enclosed with a fence or not, you will find for the defendant," and in refusing to instruct them instead, "that if you find from the preponderance of the evidence that the defendant J. R. Webb and those under whom he claims, as elsewhere herein instructed in the main charge, have had and held adverse and peaceable possession, claiming and holding openly and adversely to the plaintiff herein a few acres of the land in controversy, using and enjoying the same in the manner aforesaid, and if you find from a preponderance of the testimony that said few acres, if any, were under fence of the said Webb and those under whom he claims, and if you find that said few acres, if any, were so held and fenced for a period of more than ten years next before the filing of this suit, to wit, February 5, 1904, then and in that event you are instructed that the defendant Webb would be entitled to recover the entire eighty acres of land in controversy."

It will be seen at a glance that the theory of appellant is that if he had shown himself entitled to recover the few acres enclosed, by reason of the statute of limitation of ten years, article 3344, Sayles' Civil Statutes, requires his possession to be construed so as to embrace all the land in controversy, the same not exceeding one hundred and sixty acres; while on the other hand, the court's charge contemplates that the peaceable and adverse possession must itself extend to the entire eighty acres of land, even though it was not all actually enclosed with a fence.

This latter view we think to be a correct interpretation of our statute

of ten years limitations. While it is not required that all the land in the peaceable and adverse possession of one who seeks to prescribe under the statute should be actually enclosed or improved, yet there must be peaceable and adverse possession thereof, which necessarily postulates a claim to all of it, as declared by the court in his charge. In other words, it was never contemplated that article 3344, declaring that the peaceable and adverse possession of a defendant shall be construed to embrace not more than one hundred and sixty acres, including the improvements or the number of acres actually enclosed, should confer rights on such defendant where none were otherwise claimed. See Titel v. Garland, 87 S. W. Rep., 1152; Bracken v. Jones, 63 Texas, 184. The case last cited is peculiarly apt in the present instance, since it appears from the evidence that Warner's house and principal improvements were situated on the northwest quarter section of the block immediately south of the block in which was situated the land in controversy, and that his enclosure extended over onto this land so as to enclose with his own farm the small amount of land recovered by appellant in this case. It seems to be a case, therefore, of a mistake as to the boundary line, or mere encroachment upon the land of his neighbor, and not such possession of a part of the land in controversy as to evidence an intention to claim the whole.

The evidence is conflicting as to just what was said by the juror Carmichael prior to his selection as a juror, and while in the jury box, and we are therefore not prepared to hold that the trial court abused his discretion in refusing to grant a new trial because of the alleged misconduct of this juror. We are rather inclined to the view that the court ruled right, since the most that can be said of appellant's statement supporting this assignment is that it shows that the juror expressed a hearty disapproval of one's holding land by the plea of limitation.

There was no error in permitting the appellee to introduce in evidence the inventory of property rendered by A. Warner to the tax assessor of Eastland County for the years 1897 and 1898. These years constituted a part of the ten necessary to complete appellant's prescription, and while under the statute it is not required that Warner should have paid the taxes for those years, yet that he did not render the lands for taxes as his own is a circumstance for the jury's consideration, indicating in a greater or less degree that he did not claim them. The principal objection to the testimony was that the renditions were not shown to be those of Warner. But the evidence shows that these renditions were in the handwriting of the tax assessor, and that they came from the proper source, and article 5098, Sayles' Civil Statutes, directs that the assessor of taxes shall require each person rendering a list of taxable property for taxation to subscribe to an oath or affirmation attached to the inventory, and the presumption of regularity of official conduct making at least a *prima facie* case that the purported renditions of Warner were his, there was sufficient predicate laid for the introduction of such testimony.

All assignments of error are overruled and the judgment is affirmed.

Affirmed.

Writ of error refused.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS V. JEFF EARL.

Decided May 5, 1906.

1.—County Court—Amount—Jurisdiction.

Plaintiff sued for the value of jennets killed by the engine and cars of defendant. The value was alleged to be $1,000. The suit was for this amount with interest from date of loss. Held, the County Court had jurisdiction.

2.—Same.

If the suit had been one for damages caused by negligence proximately resulting in the injury complained of, where interest could be properly allowed as damages merely, the County Court would not have had jurisdiction. But having been brought under art. 4528, Rev. Stats., the recovery would be limited to the value of the stock killed, without interest until after judgment, and the prayer for interest should be treated as surplusage.

Error from the County Court of Tarrant County. Tried below before Hon. R. T. Milam.

Spoonts & Thompson and *Marshall Spoonts,* for plaintiff in error.—The jurisdiction of the County Court is limited to $1,000 exclusive of interest and costs, and in suits for unliquidated damages where plaintiff prays for interest, the interest is only recoverable as part of the damages and goes to the amount in controversy. Therefore, where the prayer in a suit for unliquidated damages is for $1,000 and interest from date of injury, the amount in controversy is beyond the jurisdiction of the County Court, and the court is powerless to take jurisdiction of the cause or to render any judgment therein. Ft. Worth & D. C. v. Everett, decided by this court January 28, 1905 (not reported); Baker v. Smelzer. 88 Texas, 26; Schulz v. Tessman, 92 Texas, 490; Heidenheimer v. Ellis, 67 Texas, 426; San Antonio & A. P. Ry. v. Barnett. 66 S. W. Rep., 476.

C. C. Cummings, for defendant in error.

CONNER, CHIEF JUSTICE.—Plaintiff in error presents the single question of whether the court below had jurisdiction to try the case and render the adverse judgment from which this writ of error has been sued out. We think the question must be resolved in favor of the defendant in error. In the amended petition upon which the case was tried it was alleged that certain jennets owned by defendant in error were killed by the engine and cars of plaintiff in error on an unenclosed part of its right of way. The value of the jennets killed, as alleged, aggregated the sum of one thousand dollars, for the recovery of which, together with interest thereon at the rate of 6 percent per annum from the date of loss, defendant in error prayed. The loss was alleged to have occurred on the 15th day of October, 1903, and the suit was filed on the 29th day of February, 1904. Had the suit been one for damages because of negligence proximately resulting in the injuries complained of and where interest could be properly allowed as damages merely, it seems clear under the decisions that the court in that event would have been without jurisdiction. See Baker v. Smelzer, 88 Texas, 26; Schulz

v. Tessman, 92 Texas, 490, and Ft. Worth & D. C. Ry. Co. v. Everett, decided in an unpublished opinion by this court January 28, 1905.

It is to be observed, however, that the cause of action as made by the amended petition arose under article 4528 of our Revised Statutes, which renders every railroad company liable to the owner for the value of all stock killed or injured by the locomotives and cars of such railroad company in running over their respective railways, irrespective of the question of negligence. See Galveston, H. & S. A. Ry. Co. v. Downey, 28 S. W. Rep., 109. And in such cases the recovery is limited to the value of the stock killed, interest not being recoverable until after judgment. See St. Louis S. W. Ry. Co. v. Chambliss, 53 S. W. Rep., 343; Railway Co. v. Greathouse, 82 Texas, 105. The prayer of defendant in error for interest, therefore, should be disregarded and treated as surplusage. See Smith v. Wilson, 91 Texas, 504; Conner v. Sewell, 90 Texas, 275. It follows that the limit of defendant's right of recovery, as tested by his petition, was the sum of one thousand dollars, and of this amount it is conceded the court had jurisdiction and we conclude, hence, that the judgment below must be affirmed.

Affirmed.

C. W. JOHNSON v. CHARLES SHORT ET AL.

Decided May 5, 1906.

1.—Executor—Distribution of Estate—Authority.

In the absence of authority conferred by the will an independent executor is without authority to partition the estate among the devisees.

2.—Interest of Devisee—Attachment Lien—Partition.

The plaintiff claimed the land in controversy under and by virtue of an attachment lien duly foreclosed upon the interest of the defendant in said land as one of several devisees. Before the will was probated and before the attachment was levied the defendant, by agreement with the executor, the other devisees not being parties thereto or consenting thereto, received from the executor certain personal property at a stipulated valuation, agreeing that the same should be applied on his, defendant's, part of the estate. Held, that the agreement between the defendant and the executor was not a valid partition of the lands of the estate, and did not prove that the defendant had no other or further interest in the estate.

3.—Sale of Land—Independent Executor—Power.

Where the will gave an independent executor no express power to sell land of the estate, and it is not claimed that the sale was made for the purpose of paying debts of the estate, the court did not err in refusing to consider an attempted sale of land by the executor.

Appeal from the District Court of Young County. Tried below before Hon. A. H. Carrigan.

C. W. Johnson, in propria persona.—The court erred in admitting in evidence, over the several objections of appellant, the parol testimony of R. F. Short and J. T. Rickman, and Charles Short, one of the defendants, in connection with certain receipts. The purpose of the testimony was to show a parol contract between the executors of the estate

of J. C. Short, deceased, and Charles Short, by which the latter took certain tools and material, and the other heirs the real estate. Sayles' Civil Stats., art. 2543, subd. 4; Sayles' Civil Stats., art. 624; Sullivan v. O'Neal, 66 Texas, 434; Devlin on Deeds, vol. 1, sec. 157.

The pretended parol partition of the J. C. Short estate was and is void, and ineffectual to put the interest of appellee, Charles Short, out of reach of his creditors, because the same was made by the executors and not by the heirs, who were not parties to the transaction. Sayles' Stat., art. 3607; Buffalo Bayou Ship Channel Co. v. Bruly, 45 Texas, 6; Newland v. Holland, 45 Texas, 592.

If in fact there was a parol partition between the executors and appellee, Short, the same was secret and unknown to the attaching creditors at the time of the service of attachment writ, and is ineffectual against the judicial sale and deed in pursuance thereof. Allday v. Whitaker, 66 Texas, 670.

On the death of J. C. Short the legal title of his estate vested in his devisees, and the undivided interest of appellee, Charles Short, was subject to attachment and sale under judicial proceedings. Brown v. Renfro, 63 Texas, 603; Aycock v. Kimbrough, 61 Texas, 545; Bell v. Read, 23 Texas Civ. App., 96; Roberts v. Connellee, 71 Texas, 16; 11 Am. & Eng. Ency. Law, 2 ed., 634-5-h and i.

R. F. Arnold, for appellees.—While the appellee Chas. Short could not by parol divest himself of a legal title to his interest in the real estate taken by him under his father's will, yet by parol agreement he could vest in his codevisees under the will an equitable title to such real estate that would be superior to a legal title, and such equitable title having been especially pleaded the evidence complained of was properly admitted. Aycock v. Kimbrough, 71 Texas, 330; Whitaker v. Allday, 71 Texas, 623; Todd v. Willis, 66 Texas, 714; Roy v. Whitaker, 92 Texas, 355.

The court did not err in permitting the deeds from the executors to G. W. Black and Dr. Price to be read in evidence. On the death of J. C. Short the title to his estate did not vest in the devisee under the will but passed to his executors for administration purposes, and the interest of Chas. Short could not have been subject to execution or attachment until the final partition of the estate, or until his interest therein had been segregated from the body of the estate. McDonald v. Hamblen, 78 Texas, 633; Howard v. Johnson, 69 Texas, 655; Roy v. Whitaker, 92 Texas, 355; Todd v. Willis, 66 Texas, 705.

CONNER, CHIEF JUSTICE.—This suit was brought in the ordinary form of trespass to try title to recover an undivided one-tenth interest in lot three, block two, and in lot six, block four, and in lot one and the south one-half of lot two, block twenty-two, in the city of Graham, Young County. Appellant claimed by virtue of an execution sale based upon a judgment of the Justice's Court against Charles Short foreclosing an attachment lien. The interest stated was that taken by appellee Charles Short under the will of J. C. Short, and the principal defense on the trial below was to the effect that prior to the levy of the

writ of attachment Charles Short had made a parol partition with the executors of the will of J. C. Short, by which Charles Short received certain personal property of the value of $152.60 as the full share or interest to which he was entitled under the will.

It is undisputed that appellee Charles Short is one of ten children of J. C. Short, who died testate in November, 1904; that the will of J. C. Short was probated at the January term, 1905, the inventory and appraisement being made, returned and approved January 21, 1905. By the terms of the will all of the property of J. C. Short (after that devised to his wife and not involved in this suit) was to be divided equally among his children. The fourth and last clause of the will is as follows, viz.: "I constitute and appoint my son R. F. Short and my son-in-law Jesse Rickman as executors of my will and request that no bond or other security be required of them, and that neither the County Court nor other courts of this State take any further action over my estate than the probation of this will and the return and approval of an inventory of my property." It is agreed that all of the powers of the executors named are set out in section 4 of the will, above quoted, and that said executors duly qualified. Over the objection of appellant appellees were permitted to prove by R. F. Short, J. T. Rickman and Charles Short that on January 11, 1905, they had agreed orally among themselves to the effect that said Charles Short should take certain tools, and materials, implements, etc., of the agreed value of $152.60, as the share of his father's estate coming to him by virtue of the will, and in this connection appellees offered two receipts, one dated January 11, 1905, as follows: "Received of R. F. Short and J. T. Rickman, executors of the estate of J. C. Short, tools and materials, stove, etc., as invoiced on page 150, to amount of $144.80 to apply on my part of my father's estate, this being the price agreed on by me and the executors. (Signed) Charles Short." The other receipt was dated January 30, 1905, after said attachment had been levied and was substantially in the same form as the one above quoted, for $7.80 "to apply on my part of my father's estate." Upon the foregoing testimony the court gave judgment for appellees, and hence this appeal.

The rule that tenants in common may make parol partition of lands is a familiar one, but we find no authority that in our judgment will sustain appellees' contention in support of the judgment. It may be well doubted whether the executors, at all events in the manner and at the time attempted, had power to make partition or distribution of the estate. No such power is to be found in the will either expressly or by necessary implication, and the author of Cyc., vol. 18, p. 595, in speaking of the authority of an executor says, citing cases, that "it is no part of his duty to partition or convey among heirs or devisees the real estate of his decedent or to pay legacies charged upon the land unless empowered by the will to do so." So, too, our own Supreme Court in McDonough v. Cross, 40 Texas, 281, while discussing the powers of an independent executor under a will similar in the feature under consideration to the one before us, uses the following language: "It can hardly be thought the executor is authorized by such a will to change the devise of the testator from an undivided part of the estate into a specific part thereof, selected and designated by him at his mere will

and pleasure, especially when he is one of the devisees among whom it is to be partitioned. Nor do we see that the settlement of the estate requires that he shall determine for the devisees whether they shall accept the money value of their interest in the land devised, or an undivided interest in the land itself."

But if it be conceded that the independent executors under the will of J. C. Short had the power to sell property devised by the will, or even possibly, upon final settlement, to partition among the devisees property left after the payment of debts, we can not think the agreement of Charles Short with the executors amounts to a legal partition of the lands belonging to the estate of J. C. Short, deceased. None of the other beneficiaries under the will were parties to the agreement, nor is it pretended that they consented thereto. The record fails to show that at the time any of the debts of the estate, which amounted to some four or five hundred dollars, had been paid, or even that the will had been probated, or any action thereunder taken, and the receipts exhibited as evidence of the agreement certainly give no indication that it was thereby intended that Charles Short should be absolutely and forever deprived of any right to claim or receive other property under the will, if upon final settlement it should be found that he was entitled thereto. The property received to the extent of its value would doubtless operate as an advancement, but could not, we think, be pleaded by the executors or other heirs beyond this in estoppel. The agreement in our judgment was at most but provisional. In legal effect it merely contemplated, as indicated by the receipts, that upon final distribution of the estate Charles Short should account for the property received by him at its agreed value. It certainly ought not, we think, be given the effect contended for. (Munk v. Weidner, 29 S. W. Rep., 409 and cases therein cited.)

We find no error in the action of the court in refusing to consider a certain deed offered by appellees in evidence, executed by said executors to two of appellees not hereinbefore named. The will gave the executors no express power to sell, and it is not pretended that the attempted sales were made for the purpose of paying debts. On the contrary the record shows that the debts of the estate of J. C. Short amounted to some five hundred dollars, and that a stock of merchandise owned by him was sold by the executors for approximately this amount, and in the present state of the record we will assume that the proceeds of the sale of the merchandise were applied in discharging the debts of J. C. Short as directed in the will.

We conclude that under the undisputed evidence the judgment should have been for appellant, and it will be reversed and here so rendered.

Reversed and rendered.

WESTERN UNION TELEGRAPH COMPANY v. FOREMAN STUBBS.

Decided May 5, 1906.

1.—Delay in Delivering Telegram—Agency—Pleading.

A petition which alleged the sending of the following telegram: "Come to Foreman Stubbs. Come White Fish road: Case important. Rush. Answer. (Signed) W. A. Stubbs;" that the sickness of plaintiff's wife was the cause of sending the message, and that the sender was plaintiff's brother, which facts were made known to defendant by the sender, was not subject to demurrer on the ground that it failed to allege or show that the sender was agent for the plaintiff.

2.—Charge—Measure of Damage.

A charge to find for plaintiff whatever damages may have been "due him" is not reversible error in cases in which the damages recoverable are not capable of exact measurement.

3.—Pain—Expert Testimony.

An expert may testify that certain conditions shown by the evidence would produce pain.

4.—Submission of Issue—Harmless Error.

The case being one of negligence or nothing, it was error for the court to submit the issue of a parol agreement modifying the written contract on the telegraph blank.

5.—Amount of Claim—Relevant Testimony.

Plaintiff's suit being for $1,000 it was error to excluded testimony offered by defendant to show that plaintiff had claimed only $25 before filing suit.

Appeal from the County Court of Donley County. Tried below before Hon. G. P. Morgan.

George H. Fearons and *Huff, Barwise & Huff,* for appellant.

H. B. White, for appellee.

STEPHENS, ASSOCIATE JUSTICE.—Unreasonable delay due to negligence in delivering the following telegram was the ground of recovery against appellant: "Alanreed, Texas, May 22, 1905. Dr. T. W. Carroll, Clarendon, Texas. Come to Foreman Stubbs. Come White Fish road; case important. Rush. Answer. (Signed) W. A. Stubbs." The sickness of appellee's wife caused him to thus summons the doctor, which fact was brought to the knowledge of appellant by the sender of the message, who was appellee's brother. This was sufficient notice to bring the suffering of appellee's wife within the contemplation of the parties, and the petition alleging these facts was therefore not subject to demurrer, as assigned by appellant, for failing to allege or show that appellant "had any notice that W. A. Stubbs was acting as the agent of Foreman Stubbs or the wife of Foreman Stubbs." This point is now well settled in Texas.

The ninth paragraph of the court's charge was objectionable, especially the concluding portion of it, so much so that it probably would have required the judgment to be reversed had appellee failed to re-

cover, but we do not see how it could have injured appellant, and therefore overrule the objections made to it under its third assignment.

The tenth paragraph of the charge should have done more than merely instruct the jury on the measure of damages to find for appellee whatever amount may have been "due him," but we are inclined to the opinion that this error of omission would not require the judgment to be reversed, especially as damages in this class of cases are in their nature incapable of exact measurement. The amount to be allowed is such sum as would afford reasonable compensation for the injury suffered, as indicated in the seventh special charge requested by appellant and refused by the court. That charge was properly refused, however, because it excluded one item of recovery which appellee was entitled to have considered by the jury.

The testimony of Dr. Carroll, admitted over objection, to the effect that the conditions named by him and shown by the evidence would produce pain, was clearly competent, he being an expert.

We see no serious objection to the court's charge on contributory negligence. It certainly contains nothing to the detriment of appellant.

The court erred in the seventh paragraph of the main charge in submitting to the jury the issue of a parol agreement modifying the written contract printed on the back of the blank on which the message was written, and for the same reason did not err in refusing the tenth special charge requested by appellant. The case was one of negligence or nothing, and the printed stipulations on the back of the message blank had nothing whatever to do with the issue. We are inclined to the opinion, however, that no harm could have resulted to appellant from the giving of the said seventh paragraph.

The court erred in excluding the testimony offered by appellant, tending to show that appellee had made a claim against it for twenty-five dollars on account of the delay in delivering the message to Dr. Carroll, this offer having been made prior to the institution of this suit, in which the amount of his claim was placed at one thousand dollars. It has several times been held that such testimony is admissible as an admission against interest, subject to such explanation as the witness may be able to make. This ruling we think necessitates the reversal of the judgment.

We are also inclined to the opinion that the judgment would have to be reversed because of the court's refusal to submit to the jury that phase of contributory negligence embodied in the thirteenth and fourteenth special charges requested by appellant, one or the other of which we think should have been given, and preferably the thirteenth.

The eleventh paragraph of the charge is subject to criticism for instructing the jury to reconcile, if possible, conflicting evidence.

The remaining assignments are overruled; but for the material errors above noticed the judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

THOMAS B. BLAIR ET AL. v. W. L. BAIRD ET AL.

Decided May 7, 1906.

1.—Contract—Rescission—Misrepresentation.

Where a contract for sale of ranch property provided for protection of the purchasers against any existing liens on same by depositing the obligations given by them in escrow, to be delivered to the vendor only on his producing releases of such liens, this was the sole remedy of the purchasers, and they could not rescind the contract because of misrepresentations by the seller as to the existence of liens.

2.—Evidence—Res Inter Alios.

A letter by plaintiff in the suit to his own agent was not admissible against defendant in the absence of evidence to connect defendant with or bind him by such letter.

3.—Delivery of Cattle—Tally—Joint Agent.

Where, in a sale of ranch property, cattle thereon were to be paid for in accordance with their tallying by one selected as joint agent of the buyer and seller, such tally was the only delivery contemplated, and mistake or fraud in the tally by such joint agent did not afford ground for rescinding the contract unless participated in by the opposite party.

4.—Sale of Cattle—Estimated Number—Fraud.

Where it was sought to rescind a sale of ranch property because of misrepresentation of the number of cattle thereon, the contract containing an estimate but providing for ascertaining the exact number by tally, if fraudulent misrepresentation of the number by the seller was to be submitted as a ground for rescission defendant was entitled to a charge to find in his favor if the representations, though not correct, were fairly and honestly made.

5.—Contract—Tally of Cattle Sold—Change in Method.

A change in the method of distinguishing cattle tallied in a sale of ranch property from that agreed on by the purchaser, in order to be a ground for rescinding the contract, must be shown to have caused substantial injury to the purchaser.

6.—Bank—Deposit—Conversion.

A bank to which the purchaser in a sale paid money thereon to the credit of the seller, did not, by appropriating it, with the latter's consent, to his debt to itself, become liable to the purchaser depositing it, in his suit to rescind the contract and recover back the money paid.

7.—Contract—Delivery—Date.

On a contract to take, at a fixed price, all of a certain stock of cattle that should be gathered by a named date, the purchaser was not required to take any subsequently gathered.

8.—Written Instrument.

It is the duty of the court to construe a written instrument and advise the jury as to its effect.

9.—Fraud—Mutual Guilt.

A party who has overreached another by fraudulent representations can not avoid rescission of the contract by showing that his adversary attempted to do even so to him.

Appeal from the District Court of Milam County. Tried below before Hon. J. C. Scott.

Henderson & Fowler, Camp & Caldwell, and *Freeman & Morrison,* for appellants.—Appellees did not come into court with clean hands and were guilty of fraudulent misrepresentations as to the value of the land sold to appellees and its earnings, and were thereby estopped from claiming a rescission of the contract which they had procured by fraud. 24 Am. & Eng. Ency. of Law, 624 and cases cited, notes 6 and 1.

It was the duty of the court to construe the written contract and to charge as to its legal effect, and it was error to leave the construction thereof to the jury. San Antonio v. Lewis, 9 Texas, 71; Shepherd v. White, 11 Texas, 346; Cook v. Dennis, 61 Texas, 246.

Unless appellees were injured by the representations complained of, they could not rescind, and it was fundamental error for the court not to have so instructed the jury. Read v. Chambers, 45 S. W. Rep., 742; Moore v. Cross, 87 Texas, 561; Calhoun v. Quinn, 21 S. W. Rep., 705; Hopkins v. Woldert Groc. Co., 66 S. W. Rep., 63; Stewart v. Wyoming Ranch Co., 128 U. S., 383.

The testimony of Jones and Baird objected to was inadmissible, because same was the self-serving declarations of the plaintiff to a third person not a party to the contract, in the absence of the defendants, and permitted said witnesses to corroborate each other by such declarations. Kershner v. Latimer, 64 S. W. Rep., 237; Griffith v. Lake, 12 S. W. Rep., 285; Ellis v. Randle, 24 Texas Civ. App., 480.

Said testimony was immaterial and irrelevant to any issue, because appellees did not rely upon representations as to there being no liens, but provided for releases of all liens in the contract. Webb v. Harris, White & Wilson C. C., sec. 1289; Southern Development Co. v. Silva, 125 U. S., 247; Beach on Contracts, sec. 804; 14 Am. & Eng. Ency. of Law, 106, sec. 8.

The letter of Baird to Jones was inadmissible unless communicated to appellants, and was admitted on the promise of appellees to show it had been communicated to appellants, which appellees failed to do. Ellis v. Randle, 24 Texas Civ. App., 480; Smith v. Caswell, 4 S. W. Rep., 848; Texas & P. Ry. Co. v. Boggs, 30 S. W. Rep., 1089.

The charge is erroneous, because same submits the issue of conspiracy between Blair and O'Neal, when there was no evidence showing or tending to show such conspiracy. St. Louis S. W. Ry. Co. v. Arnold, 87 S. W. Rep., 173; Ladd v. Ney, 81 S. W. Rep., 1007.

Said charge is erroneous, because same does not require appellees to have been injured by the absence of Jones from the places of tallies, and permits a rescission regardless of injury. Read v. Chambers, 45 S. W. Rep., 742; Hopkins v. Woldert Groc. Co., 66 S. W. Rep., 63.

The charge is erroneous, because it makes appellant Blair responsible for the fraud of O'Neal, the joint agent, and for fraud subsequent to the date of the contract. Navarro Pub. Co. v. Fishburn, 2 Posey's U. C., 593; 2 Wilson, C. C., sec 394; Chesterman v. Gardner, 5 Johns Ch., 29; 25 Pacific Rep., 427.

The contract, made a part of the petition, only required appellant Blair to take the steers that could be gathered by December 1, 1903, and a refusal to take steers after said time would not be ground for rescission. Bowen v. Hatch, 34 S. W. Rep., 330; Gulf, C. & S. F. Ry. Co. v. Fenn, 76 S. W. Rep., 597; Hopkins v. Woldert, 66 S. W. Rep., 63.

It appeared from the contract that the number of steers was only an estimate, and the contract could not be rescinded on that ground. Downs v. Self, 67 S. W. Rep., 897; Beach on Contracts, sec. 804.

That in estimates and opinions, an honest belief controls: Bruner v. Strong, 61 Texas, 555; Downs v. Self, 67 S. W. Rep., 897; Beach on Contracts, secs. 800, 804; Pomeroy Equity Jurisprudence, sec. 878; Southern Development Co. v. Silva, 125 U. S., 247; Mudsill Mining Co. v. Watrous, 61 Fed. Rep., 163.

The contract required the liens to be released, and a failure to do so would not be ground for rescission but for damages. Moore v. Cross, 87 Texas, 561; Meyer v. Swift, 11 S. W. Rep., 378; Chicago, T. & M. Ry. Co. v. Titterington, 84 Texas, 223; McIntyre v. DeLong, 71 Texas, 89. That subsequent fraud is no ground to rescind. Navarro Pub. Co. v. Fishburn, 2 Posey's U. C., 593; 2 Willson Civil Cases, sec. 394.

Monta J. Moore and *Hefley, McBride & Watson,* for appellees.—If appellees were shown to have made fraudulent representations, this fact could not avail appellants in an action by appellees to rescind the contract. Chaney v. Coleman, 77 Texas, 100.

A contract may be rescinded for fraudulent representations inducing its execution, though such representations were not embodied in the contract or even varied the express terms thereof. Mitchell v. Zimmerman, 4 Texas, 79; Nallwood, etc., Co. v. Berry, 10 Texas Ct. Rep., 355.

There being an issue as to whether Baird intended to waive the right to have the cattle branded, and accept the "tail-bobbing" instead, his letter of instructions upon the subject to his agent, Jones, was admissible, whether the contents of same were communicated to Blair or not—it is wholly unnecessary that it should have been. First Nat. Bk. of Tallahassee v. McCord, 39 S. W. Rep., 1003.

Appellees had the right to contract for such a method of tallying (branding) as they preferred or deemed to their interest, and a fraudulent intention of Blair at the execution of the contract, to deprive them of this right, followed by his subsequent execution of such intention, is ground for rescission of the contract at the instance of appellees, without any showing of injury to them other than such deprivation of a contractual right. American Cotton Co. v. Collier, 69 S. W. Rep., 1024; Moore v. Byars, 47 S. W. Rep., 752; Touchstone v. Staggs, 39 S. W. Rep., 189.

Appellant's fraudulent representation that he owned about 465 steers, when he owned only 233, is ample ground for rescinding the contract, it appearing that such representation was a material inducement to its execution. Dargan v. Ellis, 81 Texas, 194; Baltimore, P. B. & L. Soc. v. Smith, 54 Md., 187, 39 Am. Rep., 374.

One's false material representations are ground for rescission of a contract, though innocently made, and even believed by the party making them to be true. Beaty v. Bulger, 66 S. W. Rep., 893.

Proof of the representation that there were 3,300 head of cattle was admissible under the allegations of fraud contained in appellees' petition, and to make certain that was meant by the language "about 3,300 head" in the contract. Franco-Texan Ld. Co. v. Simpson, 1 Texas Civ. App., 600.

KEY, ASSOCIATE JUSTICE.—Appellees concede that appellants' brief contains a correct statement of the nature and result of this suit, which statement is as follows:

"This was an action by appellees, W. L. Baird and Laura Jones, joined by J. M. and J. D. Jones, to rescind a written contract, dated September 12, 1903, made between W. L. Baird and Laura Jones, parties of the second part, and Thomas B. Blair, party of the first part therein. The First National Bank of Midland, Texas, and J. T. Pemberton were joined with Thomas B. Blair as defendants. The contract sought to be rescinded was one whereby said Blair, in consideration of $40,000 sold a ranch and cattle in Eddy County, New Mexico, to W. L. Baird and Laura Jones, and took in part payment a farm of 792 acres in Milam County, Texas, at $15,000, and the assumption of a mortgage lien thereon of $3,900, and the remainder of the consideration was to be paid by a $10,000 cash payment on December 1, 1903, less the value of certain steers, and five notes for $3,000 each, due in one to five years. By the terms of the contract, appellees Baird and Jones were given the possession of the ranch at once, and appellant Blair of the farm and certain personal property thereon, and Blair was to have two years to tally out and deliver the cattle. The deed to the land and the notes, along with the contract were placed in the First National Bank of Midland, of which J. T. Pemberton was cashier, to be delivered to Blair as prescribed in said contract, and one W. W. O'Neal was made the joint agent to tally and deliver the cattle and make certificates thereof and deliver same to the bank upon which it should act, as will appear fully in said contract. J. M. and J. D. Jones were made parties plaintiff on the allegation that they owned an interest in the land and had signed the deed which it was sought to cancel, and the Bank and Pemberton were joined on allegations of their holding the deed and notes, and also on a charge of conspiracy with Blair to cheat and defraud appellees, and also that they had converted $3,000 paid by Blair & Jones on said cash payment.

"Appellees based their action to rescind upon the ground of misrepresentation of the number of stock cattle; of the number of 1903 calves; of the number of steers; upon misrepresentation as to there being no liens against the cattle; upon a concealment from them of O'Neal's relationship to Blair; upon change in the method of tally from branding to bobbing of the tails of the cattle, and a charge of conspiracy between Blair, the Bank and Pemberton and also between Blair and O'Neal to perpetrate the fraud alleged, all of which was set out at length. They also alleged that the false and fraudulent representations were made in Milam County and that Blair so made the same there in pursuance of the common purpose and conspiracy between him and the Bank and Pemberton, and also that, in violation of the terms of the contract and its duty under the escrow, the bank had applied the $3,000 to a debt due it by Blair without requiring a delivery of releases to the mortgages, and also that O'Neal, the joint agent, had not made honest and correct tallies and certificates thereof, and had not tallied out and delivered the number of head of cattle he made certificates to, and that Blair was insolvent and unable to procure releases to the liens against the cattle and could not make title thereto and that they were prevented from selling the cattle

thereby, and they asked for rescission of the contract and for a cancellation of the notes and deed, and for a judgment for $3,000 paid on the contract against all the defendants, and for judgment for the personal property delivered to Blair or its value, and for the expenses incurred by them in running the ranch, and tendering back said ranch and cattle so far as they could.

"Appellant Blair answered by general and special exceptions, all of which were overruled, and by general denial and special denial of each of the allegations of appellees, and affirmatively that appellees were not entitled to a rescission because they had refused to accept or rely upon any representations, if made, which were denied, as to the number of head of stock cattle, but had required same to be counted and he to pay for any deficiency at a stipulated price named in the contract, and had not and could not suffer any injury thereby; that as to the calves, that same were not to be counted or paid for and he had refused to guarantee any number, but had only estimated the same and had given to appellees the basis on which the estimate was made, and that there was no deficiency; that the number of steers were not guaranteed, and were only estimated, and that the basis for such estimate was given to appellees; that he did not agree to take all of said steers upon the cash payment, but only what could be gathered by December 1, 1903, and that he did take and allow appellees credit for 233 head, which were all that was gathered by said time, and that there was no deficiency in said steers; that he had informed appellees of the liens against the cattle and appellees had protected themselves against the same by requiring releases, and that the bank should hold the deed and notes until the liens were released, and releases of all liens had been procured and tendered to appellees prior to the filing of the suit, on their paying the $10,000 cash less the value of the 233 steers, and that appellees refused to do so, and he tendered said releases into court, and also that the reason he did not procure said leases (releases) sooner, was because appellee failed and refused to make the cash payment, except the sum of $3,000; that according to the laws of New Mexico, none of the liens against the cattle were valid as against appellees, because said liens had lapsed for failure to be renewed, and that appellees had not been prevented from selling the cattle, but had sold 115 head thereof; that the method of tallying of the cattle was changed by mutual consent, and if not by mutual consent, was changed on account of the poor condition of the range, cattle and horses, and the want of facilities with which to brand the stock without serious injury, and that the method adopted was common, customary and reasonable and would mark and identify the cattle for the period of time permitted for delivery, and that no harm or injury had or could come to appellee thereby; that he had not concealed from appellees the relationship of O'Neal to him, or made any representation as to said O'Neal, but he was selected as the joint agent at the suggestion of other parties, and because of his fitness and integrity, and that he had faithfully and honestly tallied the cattle and had delivered 2,174 head of the 2,200 head called for by the contract; that the contract did not require either him or O'Neal to notify appellees or their agent J. D. Jones of the times or places where the cattle were to be tallied, but that O'Neal had done so, and if said Jones was not present at

all of the places, that it was his and appellees' own fault; that he was not present at any time while said cattle were being tallied and had no understanding or agreement with said O'Neal as to the time or place where said tallying was to be done, and that if any fraud was perpetrated by O'Neal in said tally, certificates of tally, or as to preventing appellees' agent Jones from being present, that same was the fraud of a joint agent and done without his knowledge or consent; that neither O'Neal or the Bank or Pemberton knew of the contract until long after it was made and that there was no understanding, agreement or conspiracy between him and them, or any of them to defraud appellees; that the cash payment was not to be paid to the bank or to be held by the bank for releases or liens, but was to be paid direct to him, and was in fact paid to him by appellees; that appellees, with a full knowledge of the change from branding to bobbing the tails as a tally mark, had ratified and confirmed and accepted the same without objections, and had also, with a full knowledge of the same, and of the absence of Jones from the places where some of the cattle were tallied and of the difference between the number of cattle shown by O'Neal and the number by Jones, and of the number of head of steers gathered and delivered to him and of the liens against them, had received said cattle, sold some of them and paid $3,000 on the cash payment, and were thereby estopped when it was too late now to regather all of the cattle on account of a heavy death loss by reason of a serious drouth in New Mexico; that apppellees had not complied with their contract at all, and had failed to make the cash payment or to pay the interest on the loan as agreed, or the taxes on the land, and were trying to rue the trade on account of a depreciation in the price of cattle and a heavy death loss during the winter of 1903-1904, and that he had in all things complied with the contract and was not insolvent, nor never had been unable to carry out said contract.

"Appellant bank answered with a plea of privilege to be sued in Midland County, Texas, and subject to said plea, with general and special exceptions, general denial and special denial of each and all of the allegations of fraud and conspiracy against it, and also especially plead that the contract did not require the money to be paid to it or to be held by it for releases, and that the $3,000 was not paid by appellees to it but to Blair, and in the alternative that it was simply a gratuitous bailee of such money, deed and notes, and that under the interpretation of the contract by it, it was not to have or hold the money for releases, but only the deed and notes which it had held, and that it had been directed to place said money to Blair's credit by appellees, and had not been notified to hold the same, and had acted in good faith and without fraud or negligence on its part, and that it was not liable.

"Pemberton answered with a plea of privilege to be sued in Midland County, Texas, and subject thereto, by exceptions and general denial.

"Appellees replied by exceptions and general denial, and that the $3,000 was paid upon a past due debt of Blair to the bank, and also by trial amendment that the method by which the cattle were to be tallied was by branding, and that same was omitted from the contract by mutual mistake.

"Trial was had resulting in a judgment for appellees decreeing a rescission of the contract and for judgment against Blair and the bank

jointly for the $3,000, and against Blair for the personal property and for rents, and in favor of J. T. Pemberton."

Instead of submitting the case to the jury on special issues, as might well have been done, the court's charge, though submitting six different grounds for rescission, was so framed as to require a general verdict.

The contract referred to reads as follows:

"The State of Texas,
County of Milam

This instrument made and entered into this the 12th day of September, 1903, by and between T. B. Blair of Ector County, Texas, acting for himself individually and as the duly qualified survivor of the community estate of himself and deceased wife Addie E. Blair, said qualification having been obtained in the Probate Court of Ector County, Texas; said Blair known in this instrument as party of the first part, and W. L. Baird and Laura Jones, a feme sole, the said last two named parties being residents of Milam County, Texas, and in this instrument known as parties of the second part, witnesseth:

"1st. That said Blair, for and in consideration of the sum of forty thousand dollars paid and secured to be paid in the manner and subject to the stipulations hereinafter mentioned, as follows: $10,000 in cash, less the amount to represent steers, as hereinafter provided; $15,000 in land, the deed to which is attached to this contract; and the remaining $15,000 in five promissory notes, executed by the said W. L. Baird and Laura Jones, in the sum of $3,000 each, payable to the order of T. B. Blair at Midland, Texas, due respectively on or before November 1, 1904, 1905, 1906, 1907 and 1908, and each bearing interest from the date of this contract at the rate of ten percent per annum, interest payable annually on November 1 of each year; and said notes to provide that the failure to pay either of them, or any installment of interest thereon when due, shall, at the option of the holder thereof, mature all of said notes. And a lien is hereby retained on all of the hereinafter described property, cattle and increase, to secure the payment of said notes and indebtedness; provided, however, that when said notes, according to their reading and tenor, shall be fully paid off and discharged, then said lien is to become void; otherwise to remain in full force and effect, and subject, however, to the right of the parties of the second part to sell or dispose of the cattle as provided hereafter.

"2d. In consideration of these premises the said T. B. Blair has granted, sold and conveyed, and by these presents does grant, sell and convey unto the said Laura Jones and W. L. Baird, the following described property, to wit: His ranch, cattle and outfit in Eddy County, New Mexico, and the adjoining counties, consisting of his house, two watering places, wind-mills, corrals, fencing, and the use of his school section lease right; all in Eddy County, New Mexico, together with all wagons and tools now on said ranch and belonging thereto; and also about 2,300 head of stock cattle branded (we omit brands) together with the 1903 calf crop, estimated at about 1,000 head, also 25 head of saddle horses, and 11 head of stock horses counting colts. And the said Blair does bind himself, his heirs, executors and administrators to warrant and forever defend all and singular the title to said property to said

Jones and Baird, their heirs and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof.

"3d. It is understood and agreed, however, that said consideration of $40,000 shall not be paid at once to said Blair, but that said Blair is given the right to gather all the one, two and three-year-old steers in said brands above described, estimated to be about 350 head of ones, and 115 head of twos and threes, and as many as can be gathered by said Blair or by second parties, and delivered to the said Blair on or before December 1, 1903, are to be rounded up and counted as provided herein, and are to be taken away from said ranch by said Blair; and the said Blair agrees to take said one-year-old steers at $15 and said twos and threes at $20 per head, and the number of said one, two and three-year-old steers are to be ascertained in the manner and form as above provided, and upon their number being so ascertained, and upon said Blair delivering cattle to represent such payment as hereinafter provided, at $15 per head, the said party of the second part are then to pay in cash to said Blair the difference between the value of said animals as herein agreed upon and the sum of $10,000; that is, whatever sum over and above the amount the steers shall come to, and less than $10,000 the said second parties shall pay in cash to the said Blair at Midland, Texas, on December 1, 1903.

"4th. The said second parties are to execute a general warranty deed to the 792 acres of land to the said Blair, and are to execute the said five notes above described, and this bill of sale and instrument and said deed and said notes shall at once be deposited in escrow with the First National Bank at Midland, Texas, and shall only be surrendered and delivered to said Blair by said bank on the following conditions and contingencies, to wit: When said Blair shall have tallied out and delivered to said Jones and Baird 700 head of stock cattle, as above described, not including 1903 calves, then said bank shall deliver to him the deed to said 792 acres of land in Milam County, Texas, which deed is to be signed by J. D. Jones, Laura Jones, J. M. Jones and J. L. Jones. But before the delivery of this 700 head of stock cattle, the said Blair is to tally out, count and deliver to said second parties, a sufficient number of cattle at the rate of $15 per head to equal the amount of cash which shall be paid to the said Blair under the terms of this contract.

"5th. And whenever the said Blair shall have tallied out and delivered unto said second parties at any time within two years from the date hereof, an additional 180 head of stock cattle in his brand, not including 1903 calves, or any subsequent increase, then said bank shall deliver to him the first due of said series of five notes above described, and subsequent notes shall in like manner be delivered to him, one note each, first taking the one first to become due, for each subsequent 180 additional head of cattle so tallied out and delivered.

"6th. Said Blair shall have two years from the date of this contract in which to fully complete the tally and delivery of said cattle, and it is understood that if at any time prior to the expiration of said two years, said Blair shall have tallied out and delivered unto said second parties 2,200 head of stock cattle in his brand, calves of 1903 and subsequent increase not counted, this sale shall have been fully completed, and said bank shall thereupon deliver to said Blair all of said notes.

"7th. It is, of course, to be understood that said Blair shall first satisfy all liens which now exist against said cattle and deliver releases of such to said bank before either of said notes shall be delivered to him.

"8th. And the said second parties shall not be required to take more than 2,400 head of cattle under this contract.

"9th. It is also understood and agreed that if said Blair shall fail within said period of two years from this date to so turn over the full number of 2,200 head of stock cattle, not including the 1903 or subsequent year calves, then the remaining note or notes, in the hands of the bank shall be credited with the value of such number of cattle as he shall be short, at the rate of $15 per head. If, however, he shall count out and deliver more than 2,300 head of such cattle within said period of two years, said Jones and Baird obligate themselves to pay said Blair in cash at Midland, Texas, $15 per head for each and every head of such excess over 2,300.

"10th. It is understood and agreed that said Jones and Baird shall have the immediate possession and charge of said ranch, and shall retain in the management of said ranch, including employment of hands, for the two year period aforesaid, W. W. O'Neal, or in case of his inability to act or accept said position, J. D. O'Neal, and the said W. W. or J. D. O'Neal, as the case might be, shall be the agent of all parties to this contract in counting and delivering of said cattle, and that such tallies may be made at the various round-up places and at the most convenient places.

"11th. That said W. W. or J. D. O'Neal, as the case may be, if unable to be personally present at any round-up may designate some suitable person at such round-up to take said count and tally for him and in his stead, said tallies when made by said W. W. or J. D. O'Neal, as the case may be, or by any of their said deputies, shall be certified to before a notary public or some officer authorized to administer oaths; said certificates to be made and sent to said bank, and such certificates shall be received by the bank and the delivery of money, notes and deeds shall be made by said bank on the strength of same, and releases as aforesaid, of liens now existing against said cattle, such deliveries to be made on the basis of this contract.

"12th. Each party hereto shall have the right to have their representatives on the ground, if they so elect, to see that tallies are fairly made, but such representatives of either party shall have no right to dictate as to the time, place or manner of such counts.

"13th. In the event of the death or inability of the agent selected to act herein, it is agreed that a similar agent shall be selected by the parties hereto, whose acts and power and authority under this contract shall be the same as the O'Neals selected.

"14th. It is understood and agreed that second parties may take possession of said ranch at once, subject to the terms of this contract, and said parties are to bear all future expenses of management and control of said ranch, including the expense incident to tallying out of said cattle, except that if Blair desires other representation than as herein provided, he shall defray the expense of such other representation himself.

"15th. Said Blair shall have immediate possession of said land and shall likewise bear all that expense.

"16th. It is understood that said second parties are to have under this contract all of the calves of the crop of 1903 estimated at about 1,000 head, and also all future increase of said cattle sold herein.

"17th. It is understood that said second parties are to have the right to sell and dispose of such portion of the cattle herein conveyed, along from time to time as they see fit, but none of said cattle are to be sold by the said second parties, except such as are tallied out and counted by them and when sale of such cattle are made by said second parties, all the excess of the proceeds of such sales over $2,500 per annum shall be applied upon their indebtedness to said Blair, and if such excess of proceeds of such sales shall amount to more than the sum or sums then due on said notes of second parties, then Blair is to rebate interest accordingly.

"18th. It is further understood that Blair is to have the five mules and three mares of the second parties now on said 792 acres of land, and all tools and implements of second parties now used in, on and in connection with said land, and also all crops, growing or to be grown on said land during the year 1903.

"19th. It is also understood and agreed that said Blair assumes and obligates himself to pay off and discharge a note due upon said land for the sum of $3,900 and payable in five years from date, and bearing interest at the rate of 6 percent per annum, but is not to assume, pay off or discharge any other lien, mortgage or encumbrance on said land, but, except as to said $3,900 note, the said second parties covenant and agree that there are no other mortgages, liens, charges or encumbrances upon said land, and all interest to date due on said note is to be paid by the second parties.

"20th. It is expressly understood and agreed that the parties of the second part will keep up the brand of open A on both sides upon all of the increase of said cattle and that no other brand shall be kept up by second parties than said open A until the indebtedness to Blair is fully paid off and satisfied.

"Witness our hands at Cameron, Texas, this September 12, 1903.

T. B. Blair,
Party of First Part.
Laura Jones,
W. L. Baird,
Parties of Second Part."

Opinion.—Over appellants' objection the trial court permitted J. D. Jones to testify as to an arrangement between him and W. L. Baird and Laura Jones as to what they would pay him for his portion of the land, and as to the statements and declarations made by W. L. Baird to him, to the effect that appellant Blair had represented that there were no liens against the cattle. The seventh subdivision of the contract relates exclusively to the subject of liens upon the cattle, and contains a stipulation for the protection of appellees in the event of Blair's failure to furnish releases of all existing liens. Having provided in the contract for protection against existing liens, appellees are not entitled to a

rescission of the contract, even if Blair falsely represented that no such liens existed. (Southern Development Co. v. Silva, 125 U. S., 247.) This disposes in appellant's favor of all of the assignments of error which complain of the action of the court in submitting to the jury any question in reference to liens upon the cattle, and in admitting testimony in reference thereto.

The trial court should have given appellants' special charge number 7, directing the jury to disregard a letter from appellee Baird to his agent Jones, because the evidence failed to show that appellants were connected with, had any knowledge of, or were in any wise bound by the letter. (Ellis v. Randle, 24 Texas Civ. App., 480.)

Among other things the court instructed the jury as follows:

"If you believe from the evidence that at the time the defendant Blair entered into said contract with plaintiffs of September 12, 1903, that he did not then intend to honestly deliver or permit the honest delivery of the cattle according to the contract, but intended to induce false certificates to be made by W. W. O'Neal or his deputies, as to the delivery of said cattle, and you believe from the evidence that the plaintiffs relied upon the agreement of the said Blair that the said cattle should be delivered to them, and would not have entered into the contract but for such reliance, and you believe from the evidence that the defendant Blair did thereafter induce W. W. O'Neal, or his deputy, to make certificates falsely certifying that cattle had been tallied and delivered to the plaintiffs, and that such cattle so certified to had not actually been delivered to said plaintiffs but had merely been tallied out in the absence and without the knowledge or presence of the plaintiff's agent, Jesse Jones, and that in making such tallies that said O'Neal fraudulently refrained from notifying said Jones in order that he might be present, then, if you so believe, your verdict will be for the plaintiffs."

Several tenable objections are urged against this charge. By the terms of the contract, O'Neal was the joint agent of the parties; and, unless it had been shown that he had conspired with appellant Blair to defraud appellees, appellants would not be responsible for any misconduct on the part of O'Neal. No evidence tending to establish such conspiracy or showing fraudulent conduct on the part of O'Neal was produced. The charge was also misleading because it implied a difference between tallying and delivery of the cattle, while the contract and testimony showed that they were one and the same thing.

Appellants requested and the court refused the following special instruction:

"With regard to the provisions stated in the contract as to the estimate of 350 steers one year old and 115 two year old and up, you are instructed that same is not an absolute representation by defendant Blair that there were 350 head of one year old and 115 head of two year olds and up, but that same was merely an estimate based upon certain facts, and if, therefore, you believe from the evidence that during the negotiations which finally resulted in the contract, the said Blair, or his agent, Evans, stated to the plaintiff Baird, that the basis for said estimates was the number of steers carried by said Blair to the range in Eddy County, New Mexico, in 1901; the number purchased by him subsequent to that time and turned into his herd on said range; the number of

steers in his calf crops for the years 1901 and 1902, and the number of head of steers sold by him out of his herd; and that said statements as to the basis for said estimates were fairly and truthfully made, then you will find for the defendants on the issue as to the number of head of steers, although you may further believe that said number of steers on said range did not amount to 350 ones and 115 twos and up, but to very much less. Or, if you find that said statements as to the basis of the estimates of 350 one year old steers and 115 two years olds and up, were honestly made by said Blair and believed by him to be true, then you will find for defendant on said issue, although you may believe that said statements were not true."

The court having submitted the plaintiffs' theory of fraud, based upon alleged misrepresentations as to the number of steers, the requested instruction should have been given. It affirmatively presented appellants' theory upon that subject. Inasmuch as the contract does not undertake to specify the number of cattle owned by appellant Blair, and gives estimates only in regard to numbers, we are of opinion that appellees are not entitled to a rescission, unless it be shown that there was a material deficiency in the number, and that appellees were injured by the representations in reference thereto. (Moore v. Cross, 87 Texas, 557.) Furthermore, we agree with appellants that if the estimates stated in the contract were based upon reasonable data, and were honestly believed by Blair to be true, appellees are not entitled to a rescission, although he may have been mistaken in reference to the number of cattle, and may have represented to appellees that there were more than actually existed. The charge of the court was not altogether in harmony with these views.

Error is assigned upon the action of the court in refusing the following requested instruction: "If you find and believe from the evidence that the method or plan of tallying out the cattle by bobbing their tails, was done contrary to the contract and the custom of the country, and without the knowledge and consent of the plaintiffs, or that, with the knowledge thereof, the plaintiffs did not ratify and confirm the same and are thereby not estopped as heretofore charged, and you should also find and believe from the evidence that said method or plan was a reasonable one, taking into consideration the condition of the cattle, the range and the facilities with which to brand the cattle and the injury, if any, to the cattle by branding same under such conditions, and that the bobbing of the tails of said cattle would distinguish and identify said cattle so tallied in said manner for a period of two years from the cattle not tallied, if any, and that thereby plaintiffs have not been injured, then you will find for defendants on that issue, even though you may believe from the evidence that both Blair and O'Neal intended thereby to defraud the plaintiffs."

The court had already instructed the jury as follows: "If you believe from the evidence that it was agreed as a part of the written contract of September 12, 1903, that the cattle sold to plaintiffs Laura Jones and W. L. Baird, were to be tallied out and delivered to them by branding them for identification upon delivery, and you believe from the evidence that such agreement as to branding was omitted from the terms of said

contract by inadvertence or mutual mistake of the parties to same, and you further believe from the evidence that at the time said Blair made such agreement as a part of said contract (if he did) that he did not intend to tally out said cattle or permit same to be tallied out and identified by means of branding them, and you believe from the evidence that plaintiffs relied upon said agreement as to branding, and would not have entered into the contract but for same, and you further believe that the defendant Blair has fraudulently induced W. W. O'Neal to deviate from such agreement in the method of tallying them, from branding to bobbing their tails, and the cattle which it is claimed have been delivered to said plaintiffs have been so tallied by means of bobbing their tails instead of branding them, then your verdict will be for the plaintiffs, unless you believe from the evidence that the plaintiffs, after the contract was made, waived the right to have said cattle tallied by means of branding them, and in case you believe they did make such waiver, then you can not find for plaintiffs under this paragraph of this charge."

The paragraph last quoted presented the appellees' theory of the case but omitted the question of injury. It is well settled that a court of equity will not rescind and cancel a contract, unless it be shown that substantial injury will result unless such relief is granted. The charge given omitted that important feature and the requested instruction would have supplied that omission, and it should have been given.

We also hold that the court erred in directing the jury that if they found against the defendant Blair to also find against the bank. By the terms of the contract, the $10,000 cash payment was to be made by appellees in the performance of their part of the contract; and if the $3,000 sent by appellee Baird to the bank was intended as part payment of the $10,000 referred to, then the payment so made became Blair's money, and its subsequent payment to the bank did not authorize a recovery against the bank.

We also sustain appellants' contention that, by the terms of the contract, appellant Blair was only required to take the steers that were gathered by December 1, 1903, and a refusal to accept steers after that time constituted no breach of the contract and afforded no ground for rescission.

Without holding that the failure to do so constitutes reversible error, we concur with appellants in the view that it was the duty of the trial judge, unless the case had been submitted on special issues, to construe the written contract and advise the jury as to its legal effect.

The objection urged against so much of the judgment as decrees to appellees certain horses and other personal property therein described, upon the ground that the verdict does not authorize such relief, may, to some extent, be well taken; but this objection can be easily avoided upon another trial.

Appellants complain because the court refused a requested instruction to the effect that if appellees had fraudulently misrepresented the value and productive capacity of the land sold by them to appellant Blair, they would not be entitled to recover in this suit. 24 American and English Ency. Law, 624, and cases there cited, seem to support appellants' proposition to the effect that where the complaining party is

guilty of fraudulent conduct in procuring the contract, the court will refuse to grant him a rescission, although his adversary may have overreached and defrauded him. Speaking for himself only, the writer of this opinion believes that the law should be declared and applied in accordance with appellants' contention. However, this identical question was presented to our Supreme Court in Chaney v. Coleman, 77 Texas, 100, and that court ruled otherwise, and this court feels constrained to follow that decision.

Several other questions are presented in appellants' brief, but this opinion will not be extended for the purpose of considering them in detail. They have been duly considered, and upon all of them we rule against appellants. We hold that the pleadings and evidence present questions of fraud in reference to representations made by appellant Blair concerning the number of cattle of the different classes owned by him and sold to appellees.

On account of the error heretofore pointed out, the judgment is reversed and the cause remanded.

Reversed and remanded.

Writ of error dismissed for want of jurisdiction.

International & Great Northern Railway Company v. Rance Johnson and Wife.

Decided May 8, 1906.

1.—Cold Waiting Room—Subsequent Illness—Prima Facie Case.

Plaintiff's wife went to defendant's depot to take one of its trains at 2:30 in the morning on January 23. The night was cold and bleak. Because the depot was closed and locked she was obliged to stand outside for 20 minutes. When the waiting room was opened there was no fire in the stove, and the train being late she waited in the cold room 40 minutes longer. Immediately thereafter she suffered from sore throat, pains in the chest, rigors and fever. Held, the evidence made a *prima facie* case as to the cause of her illness.

2.—Physical Pain—Mental Pain.

The general rule is that from physical injury and pain, mental suffering will be implied without further proof.

3.—Waiting for Delayed Train.

Defendant's train being late and plaintiff's wife not being advised when it would arrive, she had the right to remain in the waiting room until the train did arrive, and in doing so she was not guilty of contributory negligence.

Appeal from the County Court of Montgomery County. Tried below before *Hon. J. T. Rucks.*

N. A. Stedman and *Gould & Morris,* for appellant.—The court erred in overruling defendant's motion for a new trial because the verdict of the jury is unsupported by the evidence in this: While the evidence shows that the plaintiff's wife was exposed to the cold weather, without a fire, for about an hour, and that she was afterwards sick and had chills, the evidence in no way shows that said exposure was the cause of said sickness. St. Louis, T. & A. Ry. v. Burns, 71 Texas, 481.

The court erred in overruling defendant's motion for a new trial because said verdict is grossly excessive in amount and not supported by

the evidence as to amount, because the evidence showed that the plaintiff was only exposed to the weather, which was not freezing, for about an hour, three-quarters of which time she was inside of a tight waiting-room, and it fails to show that plaintiff's sickness was caused by said exposure, and the sickness only lasted about two weeks, and plaintiff showed no damage for lost time of his wife. And $300 was largely excessive in amount for that sickness for that length of time, unaccompanied by any mental anguish. Texas & Pac. Ry. v. Shoemaker, 84 S. W. Rep., 1052.

The court erred in instructing the jury that in assessing damages for plaintiff they could take into consideration mental pain, if any, of his said wife; because there was not a scintilla of evidence that she suffered any mental pain by reason of her sickness and the negligence of defendant. International & G. N. Ry. v. Lock, 20 S. W. Rep., 855; Atchison, T. & S. F. Ry. v. Click, 5 Texas Civ. App., 225; Fordyce v. Chaucey, 2 Texas Civ. App., 26; Houston, E. & W. T. Ry. v. Simpson, 81 S. W. Rep., 353.

The court erred in charging the jury as follows: The plaintiff's wife had a right to remain at said depot during all the time which she had a right under the circumstances to reasonably expect the arrival of the train. Rev. Stats., art. 1317; Houston & T. C. Ry. v. Bell, 73 S. W. Rep., 59; International & G. N. Ry. v. Underwood, 64 Texas, 463.

No briefs for appellee.

GILL, CHIEF JUSTICE.—Rance Johnson sued the International and Great Northern Railroad Company to recover damages alleged to have been sustained by his wife, Frances, by reason of the failure of the company to open its waiting room at Conroe, Texas, and to keep it warm for the comfort of those desiring to take passage on its trains.

The company answered by general denial and plea of contributory negligence.

A trial by jury resulted in a verdict and judgment for plaintiff for $300 and the company has appealed.

The record justifies the following fact conclusions: The plaintiff's wife went to Conroe, a station on defendant's line, for the purpose of taking passage on one of defendant's passenger trains. She arrived there by rail at night and went at once to a lodging house where she secured a room and went to bed, after arranging to be called in time for the train. The train was due at 2:50 a. m. The time was January 23 and the weather was cold and windy though it was not freezing. She was called in due time and got up and dressed and went to the depot for the purpose of taking passage on the train. She arrived at the waiting room about 30 minutes before the time the train was due, but found the waiting room closed and locked. Some of those who were with her sought to awaken the agent and have him open the door, but it was not opened for about 20 minutes after their arrival, during which time they were compelled to stand in the wind and cold. Plaintiff's wife became quite chilly. When they went into the waiting room they found that there was no fire in the stove and no fuel with which to make one. They remained at the depot and in the waiting room an hour before the train

arrived (it being about 40 minutes late) and plaintiff's wife became so cold she had a rigor, or to use the words of the witnesses "her teeth chattered." Upon the arrival of the train she took passage, paying her fare, and thereafter spent three weeks in Galveston visiting relatives. While on the train she had another chill and her throat and lungs became very sore. She was confined to her bed two weeks in Galveston. Had other chills and some fever. She had a physician once and did not recover until the end of the third week. She suffered pain in her throat and chest.

One of the grounds upon which a new trial was sought was that the plaintiff did not expressly say that her illness was due to the exposure at the depot and in the waiting room, nor did she call a physician to so testify, and the failure of the trial court to sustain the point is assigned as error.

We perceive no merit in the assignment. There is no suggestion that she was ill when she arrived at Conroe or when she went to the station. The rigor which she suffered in the cold waiting room was a very natural consequence of standing in the bleak wind for 20 minutes at 2:30 in the morning, and it was followed up by what might have been naturally expected, a sore throat, pains in the chest and other chills or rigors, and fever. There is no suggestion that the chills were malarial. We think when the plaintiff showed an efficient cause and a natural and not unusual consequence immediately following, a *prima facie* case was made as to the cause of her illness. In St. Louis, T. & A. Ry. v. Burns, 71 Texas, 481, the court simply holds that the burden of proof was on the plaintiff to show that the illness was due to defendant's negligence. The court so charged in this case and we hold, as did the trial judge, that the jury were justified in concluding that this burden had been discharged.

The complaint is also made that the verdict is excessive. While the sum awarded is perhaps large in view of all the facts, we can not say the jury has abused its discretion in fixing the sum.

The further point is made that the court erred in instructing the jury that they might, in assessing the damages, consider the mental pain, if any, of plaintiff's wife suffered as a consequence of appellant's failure of duty. It is contended that as there was no direct evidence of mental pain the issue had no support in the testimony. The plaintiff's wife testified to physical pain and the general rule is that from physical injury and pain, mental suffering will be implied without further proof. (Texas & Pac. Ry. v. Curry, 64 Texas, 85.)

On the proposition that this rule does not apply to illness consequent upon the fault of another, appellant cites Houston, E. & W. T. Ry. v. Simpson, 81 S. W. Rep., 353. In that case Chief Justice James while conceding that damages for mental pain might be recovered where it results from illness caused by the fault of another, remarks that no court has gone so far as to hold that mental pain may be inferred from a case of chills and fever. In Brown v. Sullivan, 71 Texas, 470, it is held that mental distress must attend a serious physical injury accompanied by pain of body and may be inferred without further proof.

We can not see how the conclusion can be escaped that this is necessarily true of all illness accompanied by physical pain. Had the ex-

posure in the case at bar resulted in an attack of pneumonia can it be doubted that mental distress would have been its inevitable attendant? Justice Gaines in Brown's case, *supra,* merely declares what is common knowledge. In Galveston, H. & S. A. Ry. v. Rubio, 65 S. W. Rep., 1127, in an opinion by Chief Justice James, Brown v. Sullivan is cited as applicable to a case of illness. We are therefore impelled to the conclusion that in Simpson's case, supra, there was no proof of physical pain attendant upon the illness or some other reason resting in the facts which distinguishes that case.

Appellant complains of the special charge given at the request of plaintiffs to the effect that the plaintiff's wife had the right to remain at the depot during the time she had a right, under the circumstances, to expect the arrival of the train. At the request of defendant a charge had been given submitting the issue of contributory negligence predicated upon the failure of plaintiff's wife to return to the lodging house when she found the waiting room closed and unheated. The point is made that the charge complained of withdraws this issue from the jury.

The facts bearing upon this point are as follows: The lodging house at which plaintiff's wife spent the night was situated between one hundred and one hundred and fifty yards from the station. When she was admitted to the waiting room the train was due, according to its schedule, in a few minutes. She had not been advised that it was late or that if late could safely assume that it would not arrive at any time after the usual hour for its arrival. It is apparent that to return to the lodging house would have been an act of folly if she intended to leave on the expected train, for not only is it apparent that she might find it necessary to return to the station at any moment, but it is also true that without any means of knowing the exact time of arrival of the delayed train she would have thus run a grave risk of missing it altogether. Under these facts it does not lie with defendant to say that she forfeited her rights by failing to pursue the suggested course. We are therefore of opinion the issue of contributory negligence in this respect was not in the case. It follows that the court did not err in giving the charge complained of, for it clearly defined her rights.

Appellant lays much stress upon the fact that while every passenger in the party suffered in some degree from the cold and exposure no other person became ill therefrom. This is a matter of no consequence in this case, it having been shown that plaintiff did sustain the damage alleged. The judgment is affirmed.

Affirmed.

SOUTHERN PINE AND CYPRESS COMPANY v. BRUCE LUMBER COMPANY.

Decided May 9, 1906.

Contract by one Person for Another—Statute of Frauds.

Where the petition alleged that the contract sued on was executed in the name of W., but that the same was in fact the contract of the defendant, and was executed by W. as defendant's agent, and for defendant's benefit, and that the lumber sold under said contract and delivered to W. was in fact sold and delivered to defendant under its express agreement and promise to pay for the

same, that provision of the statute of frauds which requires an agreement to answer for the debt, default or miscarriage of another to be in writing and signed by the party sought to be charged therewith, has no application.

Appeal from the County Court of Harris County. Tried below before Hon. Blake Dupree.

Barbee & Niday and *A. H. Jayne,* for appellant.—The promise to pay the debt, default or miscarriage of another must be in writing, or it must be made upon some consideration of direct advantage moving from the promisee to the promisor (as for example, paying his own debt to his creditor), which consideration must be pleaded clearly. Art. 2543, subd. 2, Rev. Stats. of Texas; Hill v. Frost, 59 Texas, 25, 26; Brown v. Farmers' National Bank, 88 Texas, 265, at 272-274; Sandford v. Wilson, 2 Texas App. Civ. Cas. (W. & W.), sec. 247, p. 188; Clendening v. Matthews, 1 Texas App. Civ. Cas. (W. & W.), sec. 908, pp. 513-514; Lemmon v. Box, 20 Texas, 329; McCreary v. Van Hook, 35 Texas, 631; Warren v. Smith, 24 Texas, 484, 486; Ridgell v. Reeves, 2 Texas App. Civ. Cas. (W. & W.), sec. 436, p. 384; Galveston, H. & S. A. Ry. Co. v. Ehrenwerth, 1 Texas App. Civ. Cas. (W. & W.), sec. 786, p. 432.

Where the pleading and the exhibit are contradictory or inconsistent, the exhibit, as being the more specific, and not the pleading, will control. District and County Court Rule, No. 19; Freiberg v. Magale, 70 Texas, 116, 118; Lester v. New York Life Ins. Co., 84 Texas, 87, 90, 91; Williamson v. White, 101 Ga., 279, 65 Am. St. Rep., 305.

A. R. & W. P. Hamblen, for appellee.—This action was maintainable under appellee's pleadings, and it was not alleged that it was a contract with W. for the sale of goods to W., and said goods were delivered to W., but it was distinctly alleged that while the contract was signed by W., that same was, in truth and fact, the act and contract of appellant; that same was the contract of appellant; that appellant had informed appellee that it was its (appellant's) contract; that it was one and the same thing, and that it (appellant) would pay all sums becoming due under said contract. Hamilton v. Cushman Mfg. Co., 15 Texas Civ. App., 341; Lyons v. Daugherty, 26 S. W. Rep., 146, et seq.

Whenever main purpose of promisor is, not to answer for another, but to subserve his own purpose, the promise is not within the statutes of frauds. Lemmon v. Box, 20 Texas, 332, 333; McCreary v. Van Hook, 35 Texas, 639, et seq.; First Nat. Bank v. Greenville Oil Co., 24 Texas Civ. App., 646.

PLEASANTS, ASSOCIATE JUSTICE.—This suit was brought by appellee to recover the sum of $380 alleged to be the balance due by appellant for lumber sold and delivered to it by appellee.

The petition alleges that the contract under which the lumber was sold to appellant was executed in the name of the E. M. Ward Lumber Company, but that the same was in fact the contract of appellant, and was executed by the Ward Company as appellant's agent and for its benefit, and the lumber sold under said contract and delivered to the Ward Company was in fact sold and delivered to appellant and was so sold and

delivered under the express agreement and promise of appellant to pay appellee therefor the prices stipulated in the contract.

The contract is attached to the petition as an exhibit, and is in the form of a proposal made by the E. M. Ward Company to appellee to purchase at named prices the entire output of appellee's mill at Pauli, Texas, for six months, said lumber to be shipped to the Ward Company's planing mill at Baldwin, Texas, or to such other point on the Houston, East and West Texas Railway as the Ward Company might direct. This proposal is signed by the Ward Company and attached thereto is an acceptance signed by appellee. There is also attached to the petition as an exhibit a statement giving the dates and items of each shipment of lumber made under the contract and the price of each item, and also the amounts and dates of each payment made on the account.

The appellant answered by general and special exceptions to the petition, and general denial, and by special plea under oath denying that the contract sued on was executed by it or by its authority.

The trial in the court below without a jury resulted in a judgment in favor of the plaintiff for the amount claimed.

There is a conflict in the testimony, but there is ample evidence to support the finding that the contract sued on was the contract of appellant and was executed by the Ward Company as appellant's agent and for its benefit, and the lumber sold and delivered thereunder was in fact sold to appellant and was delivered to the Ward Company for appellant and under its express agreement and promise, made before and at the time the contract was executed, to pay appellee the prices stipulated in the contract. The uncontradicted evidence shows that the amount claimed by appellee was due it for lumber sold and delivered under said contract.

Appellant under various assignments assails the rulings of the trial court in not sustaining exceptions to the petition, and objections to the evidence introduced by appellee, on the ground that the allegations of the petition and the evidence offered by appellee to the effect that the contract executed by the Ward Company was the contract of appellant were obnoxious to the provision of the statute of frauds which requires an agreement to answer for the debt, default or miscarriage of another to be in writing and signed by the party sought to be charged therewith.

None of these assignments can be sustained. The petition does not seek recovery against appellant on the ground that it had promised to pay the debt of the Ward Company, and appellee introduced no evidence tending to show such promise. On the contrary, the allegations of the petition are that the lumber was in fact sold to appellant, and it, and not the Ward Company, was originally bound for the payment of the purchase price therefor. There is no allegation that the Ward Company was ever in any way liable to appellee for the lumber shipped it, or that it ever received any of the lumber except as the agent of appellant. As we have before stated, the evidence introduced by appellee sustains the allegations of the petition. Under this state of the pleadings and evidence the provision of the statute of frauds invoked by appellant has no application, and the several assignments presenting that question are without merit.

The assignment attacking the judgment on the ground that it is un-

supported by the evidence has been disposed of by our conclusions of fact before stated.

None of the assignments presented in the brief can be sustained, and the judgment of the court below is affirmed.

Affirmed.

MRS. LOUISA HAMILTON v. M. W. BLACKBURN ET AL.

Decided May 9, 1906.

1.—Boundaries—Unambiguous Calls—Extrinsic Evidence.

Where there was no ambiguity or uncertainty in the calls of a deed for boundaries, it was not proper to consider anything found on the ground, but not called for in the deed, as indicating the actual footsteps of the surveyor; his work must be tested by the calls in the grant.

2.—Same.

A deed fixed the south line of the land conveyed only by course and distance from points not questioned and calls for stone mounds, as corners, which were not identified. Held, that the call for course and distance could not be affected by evidence of a survey of such line made years before the deed was executed, none of the work of such surveyor being called for in the deed.

3.—Limitation—Judgment.

Limitation can not prevail against a judgment recovering title to land from one who continued thereafter to remain in possession, unless continued for the statutory term (five or ten years) after rendition of the judgment, since that rendered possession prior to the recovery of no effect.

4.—Judgment—Fraud—Mistake.

A judgment rendered by agreement of counsel authorized thereto can not be set aside as fraudulent because different in its terms from what the party attacking it understood it to be. Nor will the case be remanded to permit it to be attacked for mistake where such plea was not interposed at the trial, especially when such plea would now be barred by limitation.

5.—Wife's Separate Property—Title by Limitation.

Land conveyed to husband and wife on a consideration paid from the wife's means did not become her separate property when the title was not acquired by the purchase but by limitation arising from possession under the deed for five or ten years. Such title was community.

6.—Limitation—Setting Aside Judgment.

An action to set aside for fraud a judgment for recovery of land entered by agreement of counsel which judgment it was claimed was different from that authorized by the complaining parties, was barred by limitation in four years where the complainants, though ignorant of the nature of the judgment rendered, had taken no steps to inform themselves thereof and were not misled by any misrepresentation of it.

Appeal from the District Court of Bell County. Tried below before Hon. Sam R. Scott.

A. M. Monteith and *Walter E. Monteith*, for appellants.—The pleadings of defendants in this cause and the evidence adduced on the trial did not authorize the jury to render a verdict or the court to enter a judgment establishing the south line of the Wm. R. Chalk 233-acre tract at a distance of more than 1067 6-10 varas south of the south

line of the A. Polk 80-acre tract, or in any event at a distance far enough south to embrace the land in controversy in this cause, and the verdict of the jury and the judgment of the court should have been in favor of plaintiffs in this cause for all of said land in controversy, or in any event for part of the land in controversy herein. McCawn v. Hill, 26 Texas, 361; Jones v. Burgett, 46 Texas, 291; Gerald v. Freeman, 68 Texas, 203; Bigham v. McDowell, 69 Texas, 102; Maddox v. Fenner, 79 Texas, 291; Wyatt v. Foster, 79 Texas, 420; Ratliff v. Burleson, 7 Texas Civ. App., 623.

The defendants had not fixed and established the south line claimed by them on the ground by any natural or artificial object, the location of which could be determined. Roche v. Lovell, 74 Texas, 191; Stephens v. Motl, 81 Texas, 121; Richardson v. Powell, 83 Texas, 591.

The court erred in refusing to instruct the jury under the evidence in this case that the south line of the W. R. Chalk 233-acre tract was south from the south line of the A. Polk tract, a distance of 1067 6-10 varas. Booth v. Upshur, 26 Texas, 67, 71; Mueller v. Landa, 31 Texas, 273; Trotti v. Hobby, 42 Texas, 352; Johnson v. Archibald, 78 Texas, 102; Converse v. Langshaw, 81 Texas, 278, 279; Thompson v. Langdon, 87 Texas, 258; Logan v. Pierce, 2 Posey, U. C., 287; Minor v. Kirkland, 20 S. W. Rep., 932; Hartz v. Owen, 27 S. W. Rep., 42, 43.

The charge of the court complained of was erroneous as it permitted the jury to alter and impeach the field notes in a written instrument, to wit, the deed, by evidence of a supposed survey on the ground in which the width of the survey was extended beyond that called for in said deed, which was long afterward executed. Reast v. Donald, 84 Texas, 653; Huff v. Crawford, 89 Texas, 222; Hurt v. Heavens, 49 Texas, 318; Anderson v. Martindale, 61 Texas, 190; Jones v. Andrews, 62 Texas, 659; King v. Mansfield, 19 S. W. 858; Mock v. Hatcher, 43 S. W. Rep., 30; Schunior v. Russell, 83 Texas, 96; Farnandes v. Schiermann, 23 Texas Civ. App., 344; Booth v. Upshur, 26 Texas, 68; Merrill v. Kenney, 45 S. W. Rep., 423.

Any title or interest that was acquired in the land in controversy in this cause by Julia A. Blackburn or M. W. Blackburn was acquired by the joint possession of M. W. Blackburn and wife, Julia A. Blackburn, and by the operation of the statutes of limitation by virtue of said possession, and same was not the separate property of Julia A. Blackburn, and was the common property of M. W. Blackburn, and Julia A. Blackburn was not a necessary party defendant in said cause No. 3751, and was bound by the judgment against her husband.

There was not sufficient allegations or evidence to authorize the question or setting aside the judgment in cause No. 3751, a fortiori to question said judgment after four years had passed, prohibiting the same being questioned under the statutes of limitations of Texas.

Pendleton, Ferguson & Durrett, for appellees.—The contention of appellant that the course and distance in the deed for 233 acres of land and in the judgment in cause No. 3751, should fix the location of the south line can not be sustained, because the calls for course and distance in the field notes of said instruments are controlled by the calls for rock mounds, etc., as corners; and the charge of the court followed the

universal rule of law and instructed the jury to follow the footsteps of the surveyor, who made the survey of said land for said conveyances and fix the disputed line by the calls for artificial objects rather than by the calls for course and distance, if they could do so from the evidence.

It is immaterial whether the property was separate or community property by virtue of the statute of limitation; the verdict of the jury found that the land belonged to appellees by virtue of the deed from Burdette and the question of limitation thereby became immaterial.

FISHER, CHIEF JUSTICE.—This is an action of trespass to try title, brought December 9, 1899, by the appellants Mrs. Louisa Hamilton, Mrs. W. F. Johnson, W. T. Sutherland, A. H. Sutherland, Samuel E. Watson, Mrs. Jennie Lapice, Burgunda Lapice, Mrs. John A Green and A. M. Monteith against M. W. Blackburn, R. T. Blackburn, W. P. Blackburn and Mrs. Julia A. Blackburn.

The defendants answered by general demurrer, general denial, plea of not guilty and the statutes of limitation of three, five and ten years, and set up that there was an agreed division line established, acquiesced in and agreed to between the plaintiffs and defendants fixing the location of the line in controversy. The defendants also pleaded that the plaintiffs are seeking to claim title to the land in controversy by virtue of a judgment in cause No. 3751 of the District Court of Bell County, wherein R. H. Dickson and the plaintiffs in this suit were plaintiffs, and the defendants in this suit, the Blackburns, were defendants, which judgment is alleged to be an agreed judgment, and which it is substantially alleged awards to the plaintiffs the land in controversy. But the defendants allege that while they agreed that a judgment might be entered in cause No. 3751, that the judgment so actually entered was not agreed to, but was entered in fraud of the rights of the defendants for the purpose of depriving them of the title to the 30 acres of land in controversy, and that such judgment as so entered, was entered without their knowledge and consent; and they allege that by reason of the fraud in the entry of such judgment that the same should be set aside and canceled.

The appellants in reply to the defendants' answer filed general and special exceptions, which it appears from the record were not disposed of by a judgment of the trial court. They further plead that the judgment rendered in cause No. 3751 was in all things valid and binding, and that it fixed the location of the land in accordance with the plaintiff's theory, and that there was no fraud in the procurement of the judgment, but that it was consented to by the appellees and was entered strictly in accordance with the agreement had between the parties; that the judgment rendered in that case was in an action of trespass to try title, where the land in controversy in this suit was also in controversy in that suit, and that if the appellees had any cause of action to set aside that judgment, it is barred by the statute of limitations of four years, which judgment was rendered on the 15th day of January, 1895, in the District Court of Bell County.

The case was tried before the court and jury, and the verdict was to the effect that the appellees were entitled to recover the land in contro-

versy. It appears from the facts that there are two surveys in Bell County in the name of A. Dickson, one containing 640 acres and one 1,280 acres, the 640 acre survey lying immediately north of the 1,280-acre survey. On the 5th of March, 1853, the wife of A. Dickson and heirs conveyed to Andrew Spivy the 1,280 acre tract; on April 17, 1854, Spivy conveyed to Whitfield Chalk 1,920 acres of land on the waters of Nolen creek, 1280 acres granted to A. Dickson by patent No. 489 and 640 acres granted to A. Dickson by patent No. 488; and states that "to the records above named reference is made for a more specific description of the 1,920 acres of land hereby and herein conveyed, it being the same conveyed to the party of the first part by the heirs of A. Dickson, deceased." April 18, 1870, Whitfield Chalk conveyed to W. R. and Mary Chalk, the following described land out of the A. Dickson survey of 640 acres: Beginning at the southwest corner of an 80 acre tract owned by A. Polk out of said A. Dickson survey, for the southwest corner of this survey; thence south 70 east, 1232 varas to a stone mound for corner in the west line of a tract owned by John G. Blackburn out of same survey; thence south 19 west, 1067 6-10 varas to a stone mound for corner; thence north 71 west, 1232 varas to a stone mound for corner; thence north 19 east, 1067 6-10 varas to the place of beginning, containing 233 acres of land. December 29, 1869, a deed from W. R. Chalk and Frances C. Chalk to Jackson Brown, conveying land last described; February 14, 1871, J. J. Brown and wife conveyed to Eliza A. Johnson the 233 acres last described; December 5, 1877, the Johnsons conveyed to Sarah J. Burdett the 233 acres described.

February 28, 1890, Whitfield Chalk and Mary M. Chalk conveyed to M. W. Blackburn 300 acres of land out of the A. Dickson 1280 and 640 acre surveys, of which the beginning point is at the southwest corner of the W. R. Chalk 233 acre tract in the west line of the Dickson 640 acre survey, thence extending south; April 24, 1900, deed from M. W. Blackburn to R. F. Blackburn conveys the same land as just described; November 20, 1895, a contract executed by R. F. Blackburn reciting default in the payment of two notes given as the purchase price of the land just described, the cancellation of the notes and restoring possession of the land to Whitfield Chalk; November 7, 1895, deed from Whitfield and Mary M. Chalk to W. Chalk conveying the land just described; December 18, 1897, deed from Whitfield Chalk, Sr., and Whitfield Chalk, Jr., and their wives to the appellants in this suit; October 22, 1895, deed from R. T. Blackburn to Samuel E. Watson and Jennie Lapice, conveying tract of land out of the Dickson 1280 and 640 acre surveys; September 20, 1894, deed from R. H. Dickson to A. M. Monteith, conveying the 1,280 and 640 acre Dickson surveys.

The appellants introduced in evidence the answer of the defendants filed in this cause, which answer sets up and describes the judgment rendered in cause No. 3751 in the previous controversy and litigation between these parties. The agreed judgment rendered in that cause calls for the south line of the 233 acre tract of land conveyed by Whitfield Chalk to William R. Chalk, and substantially fixes that as the boundary line between the lands of the respective parties. The petition upon which that judgment was founded was an action of trespass to try title, and includes the land in controversy. All the defendants in that suit who

are defendants in this suit were properly served with citation and filed answers, in which they pleaded not guilty, also pleaded the 3, 5 and 10 years statutes of limitation. That suit was instituted December 21, 1892, and the agreed judgment mentioned was entered in the District Court of Bell County at the January term, 1895.

The defendants introduced in evidence a warranty deed from M. C. Burdett and Sarah J. Burdett to M. W. and W. P. Blackburn, dated October 10, 1883, conveying two tracts of land out of the A. Dickson 640 acre survey, beginning at the southwest corner of the 80 acre tract owned by Alf Polk out of said Dickson survey for the northwest corner of this; thence south, 19 west, 1232 varas to a stake in the prairie; thence south 71 east, about 800 varas to a point due south of the southeast corner of the fence around said Burdett farm; thence due north to the corner of said fence; thence in a northerly direction along said fence on the east side of the south line of above mentioned 80 acre survey in the name of Alf Polk; thence north 71 west said Polk's south line to the beginning, containing 74 acres of land, more or less. Also a warranty deed from M. W. Blackburn to Julia Blackburn, dated September 9, 1885; the land conveyed being described as a one undivided half of 174 acres of the land described in the next above deed.

It is unnecessary to set out these deeds in full, or give any further description than as stated, because it is apparent from the record that the question in controversy is as to the true location of the south line of the 233 acre tract conveyed to W. R. Chalk by the deed of Whitfield Chalk, of date April, 1870. It is the contention of the plaintiffs that the south line of the Chalk survey should be located 1,067 6-10 varas south of the point called for as the southwest corner of the 80 acre tract owned by A. Polk out of said A. Dickson 640 acres. The appellees contend that the south line of the W. R. Chalk survey was properly located as found by the verdict of the jury, and that the location at this point is identified by evidence found on the ground showing the footsteps of the surveyor.

Eliminating the question of limitation, the principal question in the case is one of boundary, and the land involved is a thirty acre strip extending along the south line of the W. R. Chalk survey. The question of limitation and the validity of the judgment rendered in 1895 between these parties, was not passed upon in the trial court, although submitted to the jury for their consideration. The verdict in favor of the appellees was based upon evidence which the trial court and the jury supposed was sufficient to identify the south line of the William R. Chalk 233 acres, which they established about 200 varas further south than the distance actuallly called for in the deed from Whitfield Chalk to Wm. R. Chalk. All of the evidence in the record that could be construed as having any bearing upon the question as to the location of the south line of the W. R. Chalk survey is shown by the following testimony:

"R. L. Chalk, a witness for defendants, testified: That he was — years old, that he was a son of Wm. R. Chalk and before the war lived with his father on the A. Dickson 640 acre survey in Bell County, Texas; on a tract of land which is now owned by Julia A. Blackburn and W. P. Blackburn. That about the year 1857 he knew that a survey

was made by a surveyor named Hoover who lived on the Cow House, that his father and his uncle Whitfield Chalk were present; that the surveyor ran along the west line of the A. Dickson survey and they run about as far south as a line of fence of Julia A. Blackburns now stands; that they then run eastward along about where said fence now stands; that afterwards he found the stake down in the ground on the west line of the A. Dickson 640 acre survey, and about where the southwest corner of the Blackburn fence now stands, referring to the diagram on the blackboard made by defendants' counsel, he made a dot on the plat above or north of the line marked for the north line of the 30 acres, and said that was about where his father's house had stood and that the enclosure of his father came as far south as the south line of said 30 acres, and that the western end of the fence bent to the northward; that the land south of said north line of the 30 acres as indicated on said plat was unenclosed, but his father had a gin and mill which stood at a point about even or a little south of the Blackburn fence and about the south line of the said 30 acres as indicated on the plat. That the place is indicated now by a hole in the ground and he had recently seen the same.

"Cross examination: Witness testified that at the time when the survey was made by Mr. Hoover he was a small boy; that he was not with the surveyors, but stood at the house and from there saw them at work, that he did not see the stake driven, but saw it afterwards and had not seen it before that time. That while the said surveyor work was being done by the surveyor he was not near enough to hear what was said by the surveyor or those who were with him, or to know from them what was the purpose of said survey; that he left that part of the country after the war commenced and did not again visit it until about the year 1874; that after the war was over he went into the northwestern territory of the United States, and remained there until about the year 1874. This witness testified positively that he was familiar with the strip of land in controversy and lived upon it, and that he knew positively that the 30 acre strip of land in question and as indicated on the plat, lay to the north of the line run and established by the surveyor referred to above, and was a part of the A. Dickson 640 acre tract owned by his father, and was actually used and occupied by his father, who built a mill at the dot on the plat as indicated just south of the south line of the 30 acre strip.

"Knox Ricketts testified that he was raised near the land of Julia A. Blackburn on the A. Dickson survey; that he remembers some time about the last of the war seeing a pile of rocks near the old Palo Alto school house, which was about on the south line of the Blackburn fence; that some time during the war when he was attending school at the Palo Alto school house he saw a surveyor running an east and west line going past the school building. On cross examination witness said that he was a small boy when he saw said surveyor; that he does not know who the surveyor was or who were with him, and did not hear what was said by the surveyor, or where or in what direction he came from, or where he and his party went, or for what purpose said line was run by the surveyor or whose land was being surveyed.

"J. S. Overton, witness for defendant, testified that in the year 1884,

he lived on and cultivated the land in the field on the tract of land known as the Blackburn land. That the field or enclosure at that time extended about as far south as the north line of the 30 acre tract shown in the plat. That during the year 1885, the land represented as the 30 acre tract was included in the enclosure and has ever since been embraced in said enclosure. That he had never seen the old Chalk gin and grist mill standing, but there is a place where there are timbers in the ground and old pieces of machinery around which indicated probable locality. The same is about on a line from east to west with the south line of the Blackburn place, which is the south line of the 30 acre strip and that place indicated on the plat thus (with a star) being the extreme dot south."

The evidence of the witness Overton is merely to the effect that the land in controversy was in 1884 enclosed and was known as the Blackburn land, and included the 30 acre tract in controversy.

Rickett's testimony is too indefinite to require notice. It is merely to the effect that he discovered during the war an old pile of rock near the Palo Alto school house on the south line of the Blackburn fence; that when he was attending school he saw a surveyor running a line east and west past the school building. He does not know who the surveyor was or what was the purpose and object of the survey, nor does he testify that that surveyor placed the pile of rocks at the point where he discovered it, nor is it shown who placed it there.

The witness Chalk is very positive in his statement that he knew that the land in controversy, the 30 acre strip, lay north of the line run and established by the surveyor which he mentions in his testimony. He states that that surveyor in 1857 ran about as far south as the line of fence of the Blackburns now stands; that they ran eastward along that line; that he afterwards found a stake down in the ground on the west line of the Dickson 640 acre survey about where the southwest corner of the Blackburn fence now stands. The survey that he testifies to was made in 1857, and it will be observed that the deed from Whitfield Chalk to W. R. Chalk was executed in 1870, and whether the survey so made as testified to, was for the purpose of identifying the land that should be described in that deed, the evidence is silent. Of course, it is true that the deed subsequently executed might adopt a previous survey or lines previously run as identifying the land to be conveyed, but the line described in the deed, according to its calls, is not the line testified to and identified by the witness. It is true that the witness testifies to facts which tend to show that some surveyor, 12 or 13 years prior to the execution of the deed, ran a survey and established a line at a point where W. R. Chalk claimed his line to be; and those footsteps would be very serviceable in identifying the location of the line if any of the work of that surveyor had been incorporated into the Chalk deed and had been called for in the field notes identifying the land; or, if there was any inconsistency or discrepancy existing between the calls as actually stated in the Chalk deed, the work of a surveyor found upon the ground who made the survey, although not called for, might be important to be considered in determining the true location of the line, and in determining which of the two inconsistent calls should prevail. But it is apparent that no issue of that character arises in this case.

The stake testified to by the witness Chalk is not called for. The calls

in the deed are for stone mounds. There is no stone mound found upon the ground which is in any manner identified as the stone mound called for in the deed to Chalk which breeds any uncertainty or inconsistency with the call for course and distance south from the Polk corner. It is true that Chalk was very positive in his statement that the line that he saw made by the surveyor in 1857 included the land in controversy, and that that was the south line of the Chalk survey. The other parts of his testimony in detailing the facts, when considered in connection with the calls of the Chalk deed do not support his positive statement; and, giving all the weight that his evidence would be entitled to, it merely establishes the fact that a survey was at one time long prior to the execution of the Chalk deed made by a surveyor selected by Chalk, and that a stake was driven down for the purpose of identifying his work; but the connection between that work, or in other words, the lines then established and the deed long subsequently executed, is not shown by his evidence or by the testimony of any other witness.

In addition to the evidence quoted, there is the testimony of the Blackburns also in the record, but it throws no light upon the original location of the south line of the W. R. Chalk survey. It is important only to be considered on the question as to how long they had been in possession and asserting a right to the land in question and establishing the issue of limitation; and as having a bearing upon the question as to the invalidity of the agreed judgment heretofore referred to. And in this connection it is well to state that we find nothing in the record tending to establish the issue of a boundary agreed to or acquiesced in by the parties to this controversy other than what is stated in the agreed judgment.

Now this brings us to the question as to what are the rules of law that should be applied to the facts of this case in determining the issue of boundary. In Missouri, K. & T. Ry. Co. v. Anderson, 10 Texas Ct. Rep., 229; 81 S. W. Rep., 781, this court said:

"The descriptive matter offered in evidence by the appellant and which is relied upon to control the express description stated in the deed, is not by the terms of the right of way deed called for as a matter of description, or as a part of the field notes tending to identify the land. The contention is that the footsteps of the surveyor who located the right of way could be found at places other than that called for in the descriptive matter contained in the deed; and to go to this point would extend the right of way some distance further north than 25 feet from the center of the track. The difficulty that lies in the way of supporting this contention is that the objects sought to be established by the appellant as found upon the ground as indicating the boundaries of the right of way according to its theory, are not called for in the field notes of the deed under which it holds; and, in cases of this character, the rule seems to be well established that lines and boundaries can not be constructed with reference to objects that may be found upon the ground as indicating the footsteps of the surveyor when there are no calls in the grants for such objects. (Anderson v. Stamps, 19 Texas, 640; Ratliff v. Burleson, 7 Texas Civ. App., 624, and cases there cited.)"

Again in Sloan v. King, 8 Texas Ct. Rep., 463, 77 S. W. Rep., 48, it was said: "Anderson v. Stamps, 19 Texas, 464; Donald v. Reese, 84

Texas, 653, and Coleman County v. Stewart, 3 Texas Ct. Rep., 422, 65 S. W. Rep., 385, and like cases announce the correct doctrine that the calls in the field notes of a survey can not be controlled by parol evidence of the existence of objects which are not called for; that the boundaries are to be determined and ascertained from some of the calls of the grant, and that parol evidence, except in actions to correct mistake, is not admissible to correct a call. But this rule does not apply when the evidence of extraneous facts and surrounding circumstances is simply in aid of a call found in the field notes, when the purpose is by such evidence to remove an ambiguity, and to determine which of two or more conflicting calls shall prevail. This is made apparent in the cases of Booth v. Upshur, 26 Texas, 71; Duren v. Presberry, 25 Texas, 517, where in each case Anderson v. Stamps is explained. The uncertainty or ambiguity in the calls of the deed from Thaxton to King and from Thaxton to Hoover did not arise upon the face of these instruments, but arises when the effort is made to apply them to the land intended to be conveyed. In applying the calls contained in these deeds it is found that the call for the northeast corner of survey number 64 conflicts with the call for course and distance 975 varas north 57 east from the known corner 200 varas from the river. The jury adopted the last call as the correct and controlling one, acting evidently upon the theory that the call for the northeast corner of survey number 64 was a mistake, and we have no doubt as to the correctness of this conclusion.

"There is no evidence, as said before, that Thaxton, in locating and surveying the land intended to be surveyed, ever ran the line from the corner 200 varas from the river on the course north 40 east to the northeast corner of survey number 64, and there established a corner as contended for by appellant. But there is evidence to the effect that, from the corner 200 varas from the river, he ran a line and marked the same on the course north 57 east, and established a corner on the east line of survey number 64; and, such being the case, we have evidence of his footsteps which is consistent with the call in the grant and which may be considered as evidence identifying this call, and giving to it a superiority over the call for the northeast corner of survey number 64. (Oliver v. Mahoney, 61 Texas, 612.)

"In the case of Johnson v. Archibald, 78 Texas, 102, the present chief justice of the Supreme Court uses this language: 'If the calls in a grant when applied to the land correspond with each other, parol evidence is not admissible to vary them by showing that, in point of fact, they are not the calls of the survey as actually made, but if, when so applied, they disclose a latent ambiguity, that is to say, if they conflict with each other, then extrinsic evidence may be resorted to in order to determine the conflict, and show the land actually intended to be embraced by the calls of the survey. Certain calls, such as for natural objects, marked lines and corners, being less likely the result of mistake, in the absence of other evidence, prevail over calls for course and distance. But the survey actually made is, in legal contemplation, the true survey, and it is always competent to show by any legal evidence, where the lines were, in fact, found upon the ground. It follows, therefore, that whenever the evidence is sufficient to induce the belief that the

mistake is in the call for the natural or artificial objects, and not in the call for course and distance, the latter will prevail and the former will be disregarded.' This doctrine is recognized in Gregg v. Hill, 82 Texas, 409; Boone v. Hunter, 62 Texas, 588; Booth v. Upshur, 26 Texas, 65; Duff v. Moore, 68 Texas, 271; Lilly v. Blum, 70 Texas, 710; Oliver v. Mahoney, 61 Texas, 612; Jones v. Andrews, 62 Texas, 660; Jones v. Burgett, 46 Texas, 291; Shelton v. Bone, 26 S. W. Rep., 225; Burk v. Manghum, 14 Texas Civ. App., 627; Robinson v. Doss, 53 Texas, 506; Castleman v. Pouton, 51 Texas, 87; Hubert v. Bartlett, 9 Texas, 103; Bigham v. McDowell, 69 Texas, 100; Aransas Pass Col. Co. v. Flippen, 29 S. W. Rep., 813; Arambula v. Sullivan, 80 Texas, 618, and Green v. Barnes, 9 Texas Civ. App., 665.

"In many of the cases cited, course and distance was made to prevail over objects found upon the ground, as called for in the field notes. This upon the theory, as so frequently stated in some of the cases, that when the facts and surrounding circumstances indicate that course and distance is the most reliable of the two calls, and that the call for the object was by a mistake, that the latter will be made to yield to the former."

There being no evidence of any uncertainty or ambiguity in the calls of the Chalk deed, it was not proper to consider, in establishing the south line of that survey anything found on the ground that was not called for in the deed, as indicating the actual footsteps of the surveyor. In such a case his work must be tested by the actual calls of the grant; and, under the authorities cited, and in view of the rule there stated, we are clearly of the opinion that there is no evidence in this record controlling the call in the Chalk deed for course and distance south of the Polk survey, and that the verdict of the jury to the contrary was not supported by the evidence, and the court should not have submitted that issue to the jury.

This brings us to the question as to whether there is any merit in the defense of limitation interposed by the appellees. If the judgment rendered in 1895 is valid, limitation can not prevail for it is clear, although conceding that the defendants have always remained in possession, that since the time that that judgment was rendered to the time that the present suit was instituted a sufficient length of time has not expired under either the five or ten years statutes, the only two periods of limitation which can be considered in this case, to create a bar. (Thomson v. Weisman, 98 Texas, 174.) In the former suit of trespass to try title between these parties was involved the tract of land in controversy, and the defendants in that case, who are the appellees here, pleaded limitation. The agreed judgment rendered in that case in 1895 fixed the line in controversy to be the south line of the W. R. Chalk survey, and awarded the plaintiffs in that case, who are the appellants here, all the land running north up to that point, which would include within the plaintiffs' land, the 30 acres now in controversy. Limitation with all other defenses existing at that date which could have been interposed by the appellees in that case, were merged into the judgment, and after which it became operative as res adjudicata, and this judgment stands in the way of the pleas of limitation, unless it can be avoided or cancelled and set aside on the ground of fraud, as alleged by appellees in their attack upon it.

The sole ground for avoiding the judgment, as stated by the pleadings is, that it was entered in fraud of the rights of the appellees, and was not the correct and true judgment agreed to. One of the defendants in the first case did not testify in this case. Mrs. Blackburn and her husband and another of the Blackburns who were the other parties to the original suit, testified in this case, and their evidence is to the effect that a judgment was agreed to; that their attorney selected by them informed them as to the terms of the agreement, and that he and the attorney of the plaintiffs agreed to the judgment. Mrs. Blackburn's evidence is based more upon information she received from her husband and son than from knowledge she actually possessed of the transaction. It does appear as a fact that the judgment was agreed to between the two attorneys, and was entered in accordance with the agreement as actually made; and the evidence of the Blackburns shows that the judgment as entered was not as they understood it. We have searched the record in vain for evidence indicating that any fraud was perpetrated in the rendition of the judgment. It may be conceded that the judgment was not as the appellees understood it, but it was entered in accordance with the understanding and agreement of the attorneys of both parties. There were no misrepresentations or statements made by the plaintiffs' attorney that misled the defendants or their attorney, or that induced them to act contrary to what they intended. There is no evidence of any fraud or want of good faith or fair dealing upon the part of the attorneys, but they both seem to have acted upon the idea that they were carrying out the agreement as they understood it. Fraud can not be inferred; it must be proven in order to set aside a judgment or an agreement entered into by the parties standing upon equal terms.

The appellees in their attack upon this judgment have seen fit to limit it solely to the charge of fraud, and in determining its validity the court will not go beyond the averments of the answer and afford relief based upon some other ground for which the judgment may be vulnerable. If it had been sought to disturb this judgment upon the ground that a mistake was made in determining the agreement as actually entered of record—that the minds of the parties had never met upon the terms there stated, there would have been some plausibility in the defense; and it might have been held that the evidence as introduced would have been sufficient to justify the court in setting aside that judgment or reforming it. But, as said before, these facts were not made an issue as they were not pleaded; and it is not the policy of this court to reverse and remand a case, merely for the purpose of permitting a party to bring into the record an issue that could have been introduced but which was not urged in the court below. If we were disposed to do so in this instance, it would avail nothing, because such ground of attack at this date would be barred by the four years statute of limitations.

It is contended by Mrs. Blackburn that the strip of land is her separate property, and that as she did not agree or consent to the previous judgment as actually entered, or subsequently acquiesced in its terms, that she is not bound by it. Mrs. Blackburn testifies that her separate means paid for the land in controversy, but she has no title to the same except that acquired by virtue of the Burdett deed, which does, in the calls for distance, embrace the land in controversy, and in

order to acquire title under that instrument it must be by virtue of an application of the five years statutes of limitation. The evidence does show that the taxes were paid by the defendants for the length of time required by the statute, and that that deed was recorded for the length of time required prior to the institution of the first suit. But the evidence shows that whatever possession there was of the land in question, either under the five or the ten years statutes, was by reason of the occupancy of herself and husband. If such occupancy would ripen into title under either statute, the title would be in the community and not in her separate right. Therefore, if it could be conceded that she was not bound by the judgment previously rendered, it would not authorize the trial court to disturb it, because she was not a necessary party to that suit, as the property being community, the judgment against her husband, who was a party, would be effectual and conclusive against her.

In view of what we have said it is unnecessary that we should particularly notice the point raised by the appellants' plea of limitation asserted against the action to set aside the former judgment; but however, we will state that after fully considering the evidence of the Blackburns, who testified in this case upon that subject, we do not think it sufficient to defeat the operation of the four years statute of limitation as pleaded by the plaintiffs. They knew that a judgment was rendered, they lived in the county where it was rendered, they had authorized their attorney to agree to a judgment. Now four years after that time they practically bring an action in the nature of a cross bill in this suit to set the judgment aside on the ground of fraud, and that they had no knowledge, until a short time prior to the filing of the suit, that the fraud had been perpetrated. There was no effort at concealment, nor were any misrepresentations made concerning the fact that a judgment was entered. If we could concede, as a matter of law, that they knew nothing about the fact that it embraced the land in controversy and awarded the same to the plaintiffs before the plaintiffs brought the present suit, the evidence fails to show that they exercised any diligence to determine the nature and character of the judgment as actually entered; or that they were misled as to its terms by the plaintiffs, or that they were lulled into a feeling of security by reason of the conduct or statement of any of the attorneys connected with the transaction, of such a nature as would induce them to refrain from an investigation and ascertainment of the terms of a judgment that so materially affected their interests, and which, with the exercise of ordinary care, they could have readily discovered.

The disposition that we make of the case renders it unnecessary that we should take up the assignments of errors and consider them in detail, but the questions passed upon are embraced in the assignments; and, in accordance with the views stated, and for the reason that it appears that the case has been fully developed, the judgment below will be reversed and here rendered in favor of the appellants for the land in controversy, and that the south line of the Chalk, which is the north line of the plaintiffs' land, be established and located 1067 6-10 varas south of A. Polk's southwest corner.

Reversed and rendered.

CARNEGIE PUBLIC LIBRARY ASSOCIATION OF BROWNWOOD, TEXAS, v. P. A. HARRIS ET AL.

Decided May 9, 1906.

1.—Special Issues—Verdict—Compliance with Contract.

On the issue whether a building contractor had complied with his undertaking, the jury, in response to one question propounded them, found that he had substantially complied, and to two other questions found that he had not complied "to the letter." Held, a finding of substantial compliance.

2.—Building Contract—Performance—Architect's Certificate.

A contractor agreed to erect a building to the satisfaction of the architect, who was made agent for the owner, the contract providing that no certificate by him, as to performance, should be conclusive on his principal, except the final one. Held, that the architect's final certificate was conclusive that the contractor had complied with his undertakings, in the absence of fraud or gross negligence.

3.—Same—Action on Bond.

An action for recovery of damages for the use of inferior materials, brought on the bond of a building contractor to perform his undertaking, is precluded, equally with one on the building contract itself, by the certificate of performance given by the architect, and which the contract had made conclusive.

Appeal from the District Court of Brown County. Tried below before Hon. Jno. W. Goodwin.

T. C. Wilkinson and *I. J. Rice,* for appellant.—The architect not having the power, under the terms of the contract, specifications and bond, to bind appellant to accept inferior work and improper material, the question of fraud and conspiracy between Harris and the architect was improperly submitted to the jury, and having been submitted the answers to such questions should have been disregarded by the court in rendering his judgment. Galveston, H. & S. A. Ry. Co. v. Henry & Dilly, 65 Texas, 686; Cannon v. Hunt, 38 S. E. Rep., 983, 49 S. W. Rep., 284; Clacious v. Black, 50 N. Y., 145, 67 S. W. Rep., 40.

Boynton & Boynton, for appellees.—By the terms of their written contract the work was to be performed under the supervision and direction of an architect, employed by appellant, and subject to his approval, and the issuance by the architect of his final certificate is binding and conclusive on all parties unless fraud be pleaded and proved. Boettler v. Tendick, 73 Texas, 493; Kilgore v. Northwest Texas Bap. Ed. Soc., 89 Texas, 465; Brin v. McGregor, 45 S. W. Rep., 923; Collier v. Betterton, 8 Texas Civ. App., 479; Johnson v. White, 27 S. W. Rep., 174; Wright v. Myer, 25 S. W. Rep., 1122; Martinsburg & P. R. R. Co v. March, 114 U. S., 550; Kennedy v. Poor, 151 Pa. St., 472; Chicago, S. F. & C. R. R. Co. v. Price, 138 U. S., 185; Elliott v. Missouri, K. & T. Ry., 74 Fed. Rep., 707.

KEY, ASSOCIATE JUSTICE.—P. A. Harris brought this suit against the Carnegie Public Library Association of Brownwood, Texas, a corporation, to recover a balance alleged to be due him on a contract for the construction of a library building.

The defendant filed a general denial and a cross bill impleading W. W. Cameron, and asserting that plaintiff had failed to comply with his contract, and that the defendant was entitled to recover upon the bond given by the plaintiff with Cameron as surety. The cross bill set forth the particulars in which it was alleged the plaintiff had breached the contract, admitted the employment of Herbert as architect, but charged that he fraudulently conspired with the plaintiff, and negligently and fraudulently permitted the use of inferior material to be used in the building. It was also charged that if Herbert was not guilty of fraudulent conduct, that he was guilty of gross negligence.

These averments were all controverted by the plaintiff in a supplemental petition filed by him. Cameron filed an answer embracing a general denial, and adopting the pleadings of the plaintiff Harris.

The case was submitted to the jury upon numerous special issues; and, upon a verdict answering the special issues submitted, the court rendered a judgment for the plaintiff for $1,138.50, with interest thereon, and the defendant has appealed.

Under the first and second assignments of error, the contention is made that the plaintiff was not entitled to recover because the jury failed to find that he had substantially complied with his contract. In response to the tenth issue submitted the jury found that the plaintiff had substantially complied with the contract. The same question was submitted twice thereafter, and the jury replied each time, "No, not to the letter." Considering these questions and the response made thereto by the jury, we think it was the latter's intention to find that the contract had been substantially complied with. But in view of the power conferred upon the architect, and the final certificate given by him, the question referred to is of little importance.

Other assignments assail the action of the court in holding that the contract vested in the architect the power to bind appellant. The contract stipulated that Herbert was to be the architect "acting for the purposes of this contract as agent of said owner;" and, after providing that the work was to be done under the direction and to the satisfaction of Herbert, and for many other details, the tenth article reads as follows: "It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials."

We think it is manifest from the language quoted that it was the intention of the parties that the final certificate of the architect should be conclusive evidence of performance of the contract by the plaintiff. Unless this construction is adopted, the words "except the final certificate," are meaningless, and have no place in the contract. It is a well settled rule that when it can be done every word of a written contract is to be given a meaning, and we see no reason why that rule should not apply in this case. The architect gave a final certificate showing that the plaintiff was entitled to the amount sued for and recovered; and, according to well settled rules of law, the jury having found that there was no fraud and that the architect was not guilty of gross negligence,

the plaintiff was entitled to recover. (Boettler v. Tendick, 73 Texas, 493; Kilgore v. Northwest Texas Bap. Ed. Soc., 89 Texas, 465; Brin v. McGregor, 45 S. W. Rep., 923; Collier v. Betterton, 8 Texas Civ. App., 484; Johnson v. White, 27 S. W. Rep., 174.)

The further contention is urged that if the certificate of the architect be held to constitute conclusive evidence of compliance with the contract, still appellant would not be cut off from its cross action for damages upon the bond, upon a showing that the plaintiff had used inferior material, etc. This contention is overruled. The bond and contract must be construed together, and if the plaintiff did not breach the contract, there was no breach of the bond.

There are some criticisms urged against the charge of the court, but in our opinion they are without merit. In some respects the findings of the jury are assailed, but, insofar as they are essential to the correctness of the judgment, we find testimony which supports them.

No reversible error has been shown, and the judgment is affirmed.

Affirmed.

Writ of error refused.

CHARLES WOLFE v. A. P. WILLINGHAM.

Decided May 9, 1906.

Trespass to Try Title—Jurisdiction—Venue.

The District Court has jurisdiction to try a case of trespass to try title for land situated in another county, and it is error to dismiss such case on demurrer questioning the jurisdiction. The question was one of venue only and to be raised by plea of privilege.

Appeal from the District Court of Travis County. Tried below before Hon. George Calhoun.

Sidon Harris, for appellant.

No briefs for appellee were on file.

FISHER, CHIEF JUSTICE.—This is an action of trespass to try title brought in Travis County by the appellant against appellee for the recovery of land situated in Mason County. Besides a general denial and a plea of not guilty, defendant's answer consists in the following exception: "Now comes A. P. Willingham, the defendant in the above numbered and entitled cause, and by her attorney excepts to plaintiff's petition and says that the same is insufficient in law, because it appears therefrom that this is a suit in trespass to try title for the recovery of a tract of land wholly situated and lying in the county of Mason and State of Texas, and that the defendant resides in said county of Mason, and therefore this court has no jurisdiction of the subject matter of this suit and to try the same."

The judgment of the court shows that this demurrer was sustained, and it expressly states that the suit was dismissed because the trial court had no jurisdiction. We do not undertake to say what would be the power of a trial court to prevent its records from becoming the dumping ground of cases, the venue of which properly belong to other counties,

for, as the record here stands, that question is not before us. It affirmatively appears that the court dismissed the plaintiff's case on the ground that it had no jurisdiction. It is expressly alleged in the plaintiff's petition that the defendant resided in Mason County, and that the land was situated in that county. The court assumed from this statement that it had no jurisdiction. The question is not one of jurisdiction but of venue. The District Court of Travis County, of course, is one of general jurisdiction, which embraces the authority to try all actions of trespass to try title, and there is no limitation in the law that restricts the exercise of this power solely to lands lying within Travis County. This was so decided by this court in State v. Patterson, 40 S. W. Rep., 224, and the same case in 42 S. W. Rep., 370.

Upon a proper plea presenting the question of venue, the court could have dismissed, but there was no such issue or question presented to the trial court. It merely dismissed on the ground of want of jurisdiction, which ruling is in opposition to the authorities cited.

Judgment reversed and cause remanded.

Reversed and remanded.

J. E. PARKER ET AL. v. CITIZENS RAILWAY COMPANY ET AL.

Decided May 9, 1906.

1.—Estoppel—Lien.

Directors of a corporation who made sale of its property covenanting to remove all liens therefrom, were estopped from asserting title thereto against the purchasers, through a sale afterwards made under a previously executed mortgage, assented to by the stockholders, securing a pledge of the bonds of the company for their own claims against it.

2.—Same—Conditions Subsequent.

Breach by the purchasers of a street railway line of their contract to continue its operation, being a condition subsequent, did not avoid the effect of an estoppel on the vendors from enforcing liens against which they had warranted.

3.—Same—Appeal and Error.

Where the facts establishing an estoppel of appellants were clearly established and undisputed, the judgment against them may be sustained on that ground, though no issue as to estoppel was submitted to the jury.

Error from the District Court of McLennan County. Tried below before Hon. Sam. R. Scott.

W. B. Carrington and *Eugene Williams,* for plaintiffs in error.—Consent of stockholders validated the lien for benefit of directors: Scott v. Farmers & M. Nat. Bank, 97 Texas, 31; College P. Belt Line v. Ide, 15 Texas Civ. App., 279; Tenison v. Patton, 95 Texas, 284; Twin-Lick Oil Co. v. Marbury, 91 U. S., 587; 3 Thompson on Corps., sec. 4068.

Title thereunder will be superior to the rights of subsequent purchasers and creditors. Willis v. Smith, 65 Texas, 658; De Garcia v. Galvan, 55 Texas, 57; Cheney v. Dunlap, 5 Law Rep. Ann., 467; West v. Miller, 25 N. E. Rep., 143; Blake v. Koons, 32 N. W. Rep., 380; Johnson v. Jouchert, 8 Law Rep. Ann., 797.

The court in submitting the issues to the jury did not submit the issue of estoppel. Defendants in error presented special issues of their own which were submitted to the jury, in none of which is there a request on the part of the defendants in error that the issue of estoppel be submitted to the jury. Linney v. Wood, 66 Texas, 28; Page v. Arnim, 29 Texas, 70.

Clark & Bollinger, for defendants in error.—By the terms of the sale the plaintiffs in error were estopped to assert or set up any rights accruing under any pretended lien upon the property of the Dummy Company. 4 Thomp. Corp., sec. 5269; 10 Cyc., pp. 1066, 1083, 1085; 2 Morawitz on Corp., secs. 630-31.

KEY, ASSOCIATE JUSTICE.—This is the second time this case has been up on appeal. A full statement of the case will be found in Scott v. Bank, reported in 66 S. W. Rep., 485; 75 S. W. Rep., 7, and 97 Texas, 31. At the last trial the case was submitted to a jury upon special issues, and judgment rendered for the defendants as against all of the plaintiffs. The plaintiffs, known and designated as Parker and associates, have brought the case to this court, and ask to have the judgment reversed and rendered for them.

The only essential difference in the case now from what it was on the former appeal is the fact that the action of the directors of the Dummy Railway Company, in passing a resolution instructing the secretary to hold the $50,000 in bonds issued April 15, 1891, for the benefit of and to secure the members of the company who had advanced money or become sureties for it, was concurred in at the time or afterwards ratified by all the stockholders of the company. On account of this difference the plaintiffs in error make the contention that the sale under the deed of trust made to secure the bonds referred to, at which sale the plaintiffs became purchasers, vested title in them. The sale referred to was subsequent to the inception of the title under which the defendants hold.

On March 8, 1892, the plaintiffs in error, joined by four other stockholders of the dummy company, submitted a written proposition offering to sell the property to W. J. Hobson "free from any encumbrance whatever." That proposition was accepted by Hobson, who was acting for the Waco Electric Railway & Light Company. On April 4, 1892, at a meeting of the stockholders and directors of the Dummy Company, the contract referred to was approved; and on the same day a warranty deed was executed by the Dummy Company conveying the property to the Electric Railway & Light Company, with covenants of general warranty, and expressly covenanting to remove all liens from the property. This sale was made to provide means with which to pay the debts of the Dummy Company, and the consideration was applied to the payment in part of the debt for which the plaintiffs in error were sureties. The defendant in error, the Citizens Railway Company, holds under the Waco Electric Railway & Light Company.

On these facts we hold that the plaintiffs in error are estopped from assailing defendant's title. (4 Thomp. Corp., sec. 5269; 2 Mor. Corp., secs. 630, 631.) The written proposition submitted by Parker and associates as stockholders of the Dummy Company, and accepted by

Hobson for the Electric Railway & Light Company, embodied the proposition to sell the property *free from any encumbrance whatever*, title to be made within sixty days from date of acceptance. As the title asserted by Parker and associates had its origin in an alleged lien antedating the proposition referred to, we hold that they are estopped. The estoppel is not avoided by the fact that Hobson and the Electric Railway & Light Company failed to operate the street car line, as stipulated in the contract and in the deed from the Dummy Company. That stipulation was a condition subsequent, and its breach did not, as between them and their vendees and Parker and associates, affect the title to the property. In fact, the Supreme Court held on the former appeal, that the transaction involved no promise, either express or implied, to Parker and associates; and in effect held that they could not even recover damages for a breach of the obligation to operate the car line.

The question of estoppel was not submitted to the jury, but there being testimony to support the estoppel, it will be presumed, in the absence of anything in the record to the contrary, that the court rested its judgment upon a finding by it of estoppel. Furthermore, the facts upon which the estoppel rests are established by clear and undisputed testimony, and it was unnecessary to submit that issue to the jury.

No error has been shown, and the judgment is affirmed.

Affirmed.

Writ of error refused.

JOSEPHINE E. ALBIN v. GULF, COLORADO & SANTA FE RAILWAY COMPANY.

Decided May 9, 1906.

1.—Failure to Stop Train at Station—Schedule.

In a suit against a railroad company for failure to stop its passenger train at plaintiff's destination in order that plaintiff might alight, it appearing that plaintiff had no ticket to her destination but offered to pay full fare, the defendant answered that the train which plaintiff boarded was a fast passenger train which stopped only at the more important stations, not including plaintiff's destination; that the schedule of said train was regulated by a time card which was duly and regularly published; and that besides said fast train defendant operated daily another train which stopped at all stations for the accommodation of the local travel, to which class the plaintiff belonged. Held, defendant's answer was not subject to general exception.

2.—Admission and Exclusion of Testimony—Harmless Error.

It not being contended that plaintiff was entitled to damages solely on the ground of humiliating conduct on the part of the conductor toward her and independent of the legal right to eject her, errors in regard to testimony which concerns only the conductor's conduct can not have the effect of reversing the judgment.

3.—Schedule—Stopping Places—Duty of Passenger.

It is the duty of a person about to take passage on a train to inform himself as to its stopping according to the regulations of the company, and if he makes a mistake, not induced by the company against which ordinary care would have protected him, he has no remedy against the company for the consequences.

4.—Same—Through Trains.

Having provided the public with adequate accommodations by means of regular trains for a daily passenger service between all stations, a railroad company is at liberty to run other trains stopping at certain stations only.

Appeal from the County Court of Montgomery County. Tried below before Hon. Jas. T. Rucks.

W. M. Williams and *S. A. McCall,* for appellant.—When a depot is shown to be a passenger depot, the presumption is that it is a depot for all passenger trains, and it devolves upon the pleader, when exempting it as such, to plead such facts as will justify and excuse failure to so use it as such. Fetter on Carriers, vol. 1, p. 307; Hull v. East Line & Red River Ry. Co., 66 Texas, 619-20; Rev. Stats., arts. 4494 and 4496.

The court erred in giving the sixth special charge requested by the defendant, as follows:

"If you believe from the evidence that the plaintiff boarded defendant's train, known as the 'flyer,' at Conroe, Texas, without making inquiry to ascertain whether or not said train would stop for passengers to alight at Clinesburg, and without reasonable ground to believe said train would stop at said station in order to permit her to get off, then you will let your verdict be for the defendant."

That the relation of "Carrier and Passenger" did exist, see, Missouri, K. & T. Ry. Co. v. Williams, 91 Texas, 257-8; Houston & T. C. Ry. Co. v. Washington, 30 S. W. Rep., 719; Ray on Imposed Duties by Passenger Carriers, 4 to 7; Boothe's Street Railway Law, sec. 326, and notes; Beach, Law of Railways, art. 856; Thompson on Carriers, 42-43; Fetter on Carriers, vol. 1, par. 221.

A custom to stop a train at a station at which it is not scheduled to stop is a waiver of the regulation. Hull v. East Line & R. R. Ry. Co., 66 Texas, 619-20; Texas & P. Ry. v. Elliott, 22 Texas Civ. App., 31-32; Kohn v. Washer, 64 Texas, 132; Merriman v. Fulton, 29 Texas, 98; Storey on Agency, 127-443; Lawson on Carriers, 229-30; Hutcheson on Carriers, 267, 268, 269; Fetter on Carriers, vol. 1, p. 307.

Because the evidence showed that the rule or time card pleaded and relied upon by the defendant in this case in the operation of its said train, known as the "Flyer," and the method of enforcing the same, is unreasonable, illegal, and is a discrimination between persons seeking transportation to the station of Clinesburg, and especially on the very day plaintiff was ejected from its said train. Rev. Stats., arts. 4494, 4542; Eddy & Cross, Receivers, v. Rider, 79 Texas, 53; International & G. N. R. R. Co. v. Hinzie, Guardian, 82 Texas, 628; approved in Mahoney v. Detroit St. Ry., 93 Mich., 614; 53 N. W., Rep., 793.

J. W. Terry and *A. H. Culwell,* for appellee.—The appellee had the right to prescribe that certain of its trains would not stop at the station of Clinesberg for passengers. It likewise had the right to prescribe that this train would not stop to take on or put off passengers who had taken passage at certain given stations. It had the right to prescribe such a schedule for this train as in its judgment was desired, and having so prescribed, it is not and was not the province of appellant to complain. All that she had the right to ask were there train facilities which

would permit her to go to Clinesberg, and the evidence is uncontradicted that such facilities were furnished, to wit, other trains. Gulf, C. & S. F. Ry. Co. v. Moore, 11 Texas Ct. Rep., 424; St. Louis Southwestern Ry. Co. v. Campbell, 69 S. W. Rep., 452, and authorities there cited.

JAMES, CHIEF JUSTICE.—Plaintiff (Mrs. Albin) alleged that she boarded appellee's train at Conroe for Clinesburg and offered to pay the legal fare to the latter station, and was without lawful cause and with great force and violence and in a manner humiliating to her ejected from the train at the station of Waukegan (which was the station next before reaching Clinesburg), and upon this based her action for damages.

Defendant pleaded certain exceptions, and general denial. Also a special plea in substance as follows: That on August 23, 1904, appellee operated a daily mixed train between Conroe and Clinesburg which afforded ample passenger accommodations between said points, stopping each day at said stations. Also that on said date and for some time prior thereto, it operated a daily passenger train known as "The Flyer," said passenger train being operated from Beaumont to Somerville, Texas, and from Somerville to Beaumont. That said train was a fast passenger and stopped only at the more important stations. That it does not and did not, on said date, regularly stop at Clinesburg. That the schedule of said train was regulated by a time card which was duly and regularly published. That said train when east or south bound does not and did not on said date stop at the station of Clinesburg for the purpose of allowing passengers to debark at said station who took passage at Somerville or at points east and south thereof.

Plaintiff pleaded to this that if there ever existed such a time card, or if it was ever promulgated she had no knowledge of any such rule or regulation, and further that in the operation of said "Flyer" it was so frequently and commonly stopped at Clinesburg for the purpose of allowing passengers entering said train at intermediate points between Somerville and Clinesburg, and especially at the station of Conroe, to debark, that said rule was abrogated and was no justification for plaintiff's ejection on this occasion. That in the handling of said train divers persons boarding same at intermediate points for transportation to Clinesburg, with the knowledge and consent of appellee who accepted fares and tickets to the station of Clinesburg without objection, and which persons were allowed to debark at Clinesburg, by reason of which said train became a passenger train for all purposes for said station of Clinesburg, whereby appellee was estopped from urging said rule.

A verdict was returned for the defendant.

The first assignment of error attacks the sufficiency of the special answer. We hold that it was sufficient.

The eighth assignment complains of a question as leading, the answer to which is said to have been, "There was not any loud or boisterous language used by the conductor." The ninth also complains of a question as leading which evoked the following answer from the same witness: "I was in the first or second seat behind her and heard nothing about sick children. I was in a position to hear everything said loudly." The tenth complains of the exclusion of the following testimony given by another witness: "I never heard him use any insulting language. I

did not think he treated her with much respect. I was red-headed with him when he got through."

None of these points, if theoretically sound, can have the effect of reversing the judgment, for the reason that they all affect the manner in which plaintiff was treated by the conductor, in her eviction. The case for recovery was submitted by the court upon the issue of whether or not the conductor had the right to put her off the train, and that issue was found in favor of the defendant. Nowhere so far as appellant's brief shows, is there any contention that plaintiff was entitled to damages solely on the ground of improper or humiliating conduct on the part of the conductor toward her, and independent of the legal right to eject her. Under the circumstances errors in regard to testimony which concerns only the conductor's bearing towards plaintiff, can not have the effect of reversing the judgment.

The court by the first paragraph of the charge submitting the issues told the jury that if plaintiff boarded the train at Conroe without a ticket believing she did not have time to procure one, and with the *bona fide* intention to take passage thereon to Clinesburg and intending to pay the legal fare when demanded, that she thereby became a passenger and should recover, unless under instructions given in reference to defendant's special plea, such relation did not exist. Second paragraph: If bearing in mind what the first paragraph says in regard to the relation of passenger she so entered the train, and when called on by the conductor for her fare she tendered him four cents a mile between said stations, then under the law she was lawfully upon said train and became a passenger thereon between said stations of Conroe and Clinesburg and if thereafter the conductor used insulting language towards her and ordered plaintiff to leave the train and ejected her therefrom, refusing to further carry or transport her, etc., to find for plaintiff.

The next portion of the charge presented the case in its reference to the special plea, substantially as follows: That if on said date and prior thereto defendant operated its passenger train known as "The Flyer" between Beaumont and Somerville, and Somerville and Beaumont, that its schedule was regulated by a time card regularly published and promulgated, that as so operated it did not stop at Clinesburg for the reception and debarkment of passengers boarding same between Somerville and Cleveland, and futher, if they found that plaintiff with full knowledge of the manner of running said train, boarded same with the knowledge or consent of the agents and servants in charge thereof at Conroe intending to take passage thereon to Clinesburg, and further find that said plaintiff knew said train did not convey passengers from Conroe to Clinesburg and debark them, to find for defendant.

Then followed a paragraph which told the jury plainly that if they found said train was operated as above, yet if they found that the agents and servants in charge of such trains known as "The Flyer" so frequently and habitually violated such rule in transporting passengers from Conroe and other intermediate points between Somerville and Cleveland, as to show that the rule was not in force, then in law this would be an abrogation of such rule and it would afford no defense in this case.

The court at the instance of defendant gave the following special instruction: "If you believe from the evidence that the plaintiff boarded

defendant's train known as 'The Flyer,' at Conroe, Texas, without making inquiry to ascertain whether or not said train would stop for passengers to alight at Clinesburg, and without reasonable ground to believe that said train would stop at said station in order to permit her to get off, then you will let your verdict be for the defendant."

From the above instructions it will be seen that plaintiff was in plain terms allowed a recovery unless the rule was found to have been in force and effect governing the operation of the particular train, and even then plaintiff was declared to be entitled to recover if she had reasonable ground to believe that the train would stop at Clinesburg when she boarded it. This reasonable ground under the evidence here, existed, if it existed at all, in connection with the habit, if any, of the train stopping at Clinesburg for such purpose.

Appellee was operating another daily train for passengers between the stations of Cleveland and Somerville, which stopped at all stations, among them Clinesburg. This train is known as the "Boll Weevil." There was evidence that "The Flyer" had been put on in June, 1904, and when southeast bound, it stopped at all stations between Cleveland and Beaumont, but between Somerville and Cleveland it stopped only at the larger stations, except when stopped by flag from the smaller stations, one of which was Clinesburg, for the purpose of taking passengers who desired to go to some point southeast of Cleveland, or it would stop at such stations to let off passengers coming from the north of Somerville and from other railroads connecting with the Santa Fe. When north bound, that is, going from Beaumont to Somerville, the train stopped at all stations between Beaumont and Cleveland, but between Cleveland and Somerville it stopped regularly at only the larger stations, but would stop at intermediate stations when flagged to take on passengers bound for some point north of Somerville, or to let off passengers who got aboard at some station east of Cleveland. In other words that this train was under a rule or regulation to stop at such points as Clinesburg between Somerville and Cleveland, in such cases only, and between said points defendant operated another and sufficient daily passenger train stopping at all places.

There was evidence that the Flyer stopped at Clinesburg only when required to for the purposes indicated above, that it did not habitually stop there, and that it was generally known at Clinesburg where plaintiff lived, that such was the rule under which it was being operated.

There was evidence that plaintiff was promptly informed by the conductor that the train was not scheduled to stop at Clinesburg, that he refused to accept fare from her to Clinesburg and thus contract to take and leave her there, that he offered to take her fare to the next regular stopping place beyond Clinesburg, she to take the chance of the train stopping at Clinesburg, but this she refused, unless the conductor would agree to let her off at Clinesburg, which he declined to do. Thus it appears from the evidence in the case, that the duty of the conductor required him to pass Clinesburg unless the train happened to be flagged at that point, which he could not know until he reached there. That under these circumstances when the train reached Waukegan she was put off the train, she refusing to pay fare to the next station and take the chance of the train being flagged to stop at Clinesburg, and he re-

fusing to make a contract to stop the train at Clinesburg for her, by accepting the fare to that point.

There was sufficient evidence to warrant the jury in finding that plaintiff sufficiently knew the circumstances relative to the stopping of this train at Clinesburg to make it appear that she got upon this train without reasonable ground for believing that it would stop at that station, and as the jury must have found the facts to be in accordance with this theory, the verdict should be sustained, if the instructions given by the court embodied the law correctly on the subject.

The only charge complained of is the special charge above copied. It is vigorously attacked. But in our opinion the criticisms do not affect it. It did not authorize a verdict for defendant unless two things concurred, namely, that plaintiff boarded the train without making inquiry as to whether or not it would stop at Clinesburg; and further, that she had no reasonable ground to believe that it would stop there. If the jury found for defendant under this charge they necessarily found that she had no reasonable ground for believing that it would stop there, because their finding had to include that fact, if they found for defendant under that charge. If they found that fact, it was immaterial that she failed to make inquiries. Neither did the charge conflict with the main charge, for under all the evidence presented, whatever ground she had for believing or not believing that it would stop at Clinesburg, had reference to the custom or manner of stopping the train at that place.

The law of the case appears to be now well settled. It is the duty of a person about to take passage on a train to inform himself as to its stopping according to the regulations of the company, and if he makes a mistake not induced by the company against which ordinary care would have protected him, he has no remedy against the company for the consequences. (Beauchamp v. International & G. N. Ry., 56 Texas, 240.)

We are inclined to think that if the company is known to habitually stop at a station, and a person is misled by this to so believe and boards such train in the belief, so induced by the conduct of defendant, he would acquire a right to be let off there. That issue was presented by a charge which in effect told the jury to find for plaintiff if the train was so operated as to induce the belief that the rule relied on had been abrogated, or plaintiff had reasonable ground to believe that the train would stop there.

Defendant had a right to run a system of fast trains between Cleveland and Somerville, stopping at certain stations only, having complied with the law and provided the public with adequate accommodations by means of other regular trains for a daily passenger service between those places, stopping at all stations. Having done this, the statute was satisfied, and it was at liberty to run other trains stopping at certain stations only between those points. (Railway v. Moore, 11 Texas Ct. Rep., 424.)

If Clinesburg was one of the stations at which such train was not scheduled to stop, plaintiff could not by boarding the train without having made inquiry as to whether she was boarding the right train, acquire the right to have it stop there. This, however, is subject to exceptions, such as where, by some act of the defendant's agents and

servants, she has been led to take the particular train. In this case the court in effect told the jury to find for her unless they found she knew of the rule, or that she entered the train without reason to believe it was to stop at Clinesburg.

According to evidence in the record, which the jury had a right to accept, this "Flyer" had been operated under the arrangement indicated by the testimony of the conductor and others, for several months; it passed Clinesburg as often as it stopped there; it was generally understood at Clinesburg that it would not stop there regularly, and only under special circumstances. Plaintiff lived at Clinesburg not far from the depot. Clinesburg was evidently a small place.

The jury must have considered from the evidence that she had knowledge of the regulation, and that she had no reason leading her to believe on this occasion that this particular train was to be stopped there.

The printed time card concerning the "Flyer" was introduced as evidence by defendant and is in the record. The assignments of error in reference to this instrument are not sustained. The time card if susceptible of the construction that it provided for this train to stop at Clinesburg for all classes of passengers, it was not so construed, understood or acted upon by defendant, its servants and agents. The fact is that by virtue of the time card as understood by them, the train had been operated between said stations for months in the manner testified to by the conductor and others. Plaintiff did not claim to have been misled by the time card or that she had ever seen one, and the jury evidently found that her knowledge of the circumstances connected with the stopping of the train at Clinesburg was such as to give her notice of the regulations under which it was being operated.

Affirmed.

FLEMING & FLEMING v. B. F. PYE ET AL.

Decided May 9, 1906.

1.—Garnishment—Replevy Bond—Defendant Debtor not Estopped to Quash Writ.

A defendant debtor who has obtained possession of the garnished fund by giving a replevy bond is not estopped thereby from moving to quash the writ of garnishment. The statute expressly authorizes him to make any defense that the garnishee could make.

2.—Same.

Sayles' Revised Statutes, art. 225, construed. Jones v. Bull, 90 Texas, 194, distinguished.

Appeal from the County Court of Jefferson. Tried below before Hon. D. P. Wheat.

Teagle & Conley and *G. P. Daugherty,* for appellants.—The writ of garnishment is fatally defective because it did not specify any certain date or time for the garnishee to answer, it lacks the statutory requirement for the garnishee to appear and answer on the first day of the ensuing term. Rev. Stats., art. 220; Curtis v. Henrietta Nat. Bank, 14 S. W. Rep., 614; Rev. Stats., art. 223; Wright v. Wilmot, 22 Texas,

398; Caspary v. Greely-Burnham Co., 3 Texas App. Civ. Cases, 175; Hendley v. Baccus, 32 Texas, 328.

When the defendant in the original action has replevied money he can make any defense to the garnishment suit which the garnishee can make. Sayles' Rev. Stats., art. 225; Ball v. Bennett, 21 Texas Civ. App., 400.

Garnishment rests wholly on judicial process and depends on the due pursuits of the steps prescribed by law for its prosecution. It can derive no aid from the voluntary acts of the garnishee. Drake on Attach. (5th ed.), par. 451b; Insurance Co. of North America v. Friedman, 74 Texas, 56; Ball v. Bennett, 21 Texas Civ. App., 400.

Xavier Ryan, for appellee.—Appellants are estopped from denying their liability upon the replevy bond because said bond was executed by them for the fraudulent purpose of obtaining possession of effects over which the court already had jurisdiction, and the title to which was in controversy, and thereby remove said effects beyond the jurisdiction of the trial court, and beyond the reach of any judgment the court might render in favor of appellee; and because appellants, by the execution of said bond, did so remove said effects beyond the limits of this State in furtherance of such fraud and conspiracy. Jones v. Bull, 90 Texas, 194.

JAMES, CHIEF JUSTICE.—This is an appeal by Fleming & Fleming from a judgment rendered against them on a replevy bond which they gave to secure possession of a fund that had been garnisheed in the hands of the Park Bank & Trust Company of Beaumont. In the main case Fleming & Fleming and the Gilbert Book Company were sued for a debt and the writ of garnishment was issued to the said Bank & Trust Company requiring it to answer what it was indebted to said defendants or either of them. This writ commanded the Bank & Trust Company "to be and appear before the said court at the next term thereof to be held in Beaumont in said county on the —— day of ——, A. D. 1905, then and there to answer under oath," etc.

The garnishee appeared and answered. The Gilbert Book Company undertook to appear in this garnishment proceedings, for the purpose of filing a motion to quash the writ of garnishment. The court did not permit them to appear, but no appeal has been taken by the Gilbert Book Company to this action of the court. Fleming & Fleming, who had given the replevy bond, appeared and made a motion to quash the writ which was entertained and overruled, the ground of the motion being that it was defective in that it did not mention any certain time or date for the garnishee to make its answer. Fleming & Fleming have appealed and among other things assign as error this ruling of the court, contending that the writ was void and that the court, therefore, had no basis for the judgment rendered.

Accompanying this opinion, is an opinion by this court, on an appeal in the main case, wherein we hold, giving full reasons therefor, that the writ was defective and not sufficient, under our statute, to subject the fund. The Gilbert Book Company v. B. F. Pye (this day decided). The legal consequence of this view of the law is to require the judgment

to be rendered in favor of Fleming & Fleming, as they appear to have been dismissed from the main case, and are to be held, if at all, by force of the writ of garnishment. Article 225, Sayles' Revised Statute, provides that "in all proceedings in garnishment where the defendant gives bond as herein provided for, such defendant may make any defense which the defendant in garnishment could make in such suit."

In this connection appellee contends (citing Jones v. Bull, 90 Texas, 194, in support of the contention) that Fleming & Fleming recognized the validity of the writ long enough to execute the replevy bond, and to obtain thereby the fund and place it beyond the jurisdiction of the court, and ought not to be permitted to perpetrate a fraud upon the court and upon the rights of the appellee.

The case of Jones v. Bull was where a claimant's bond had been given with respect to some gin machinery, the claimant taking same and converting it. When sued on the bond the sureties denied liability upon the ground that the machinery was a part of the realty and the bond which they had given was for personal property. This they were not permitted to do, and among other reasons given by the Supreme Court, it was stated that having given the bond and procured the possession of the property by means thereof, Bull and his sureties would be estopped to deny that the property was of the character that gave the court jurisdiction to administer the proper remedies in reference to it.

In the present case Fleming & Fleming were defendants, and as defendants gave the replevy bond, which entitled them by express provision of the statute to make any defense which the garnishee could have made. This right extended to any valid ground for quashing the writ of garnishment. When the replevy bond was given it stood for the fund, and it matters not what Fleming & Fleming did with the money afterwards. They had taken it as theirs, giving the statutory bond in place of it. The liability was shifted from the garnishee to them. They were not denying the validity or effect of their replevy bond, nor its application to the fund. It can not be held that they were estopped from doing the very thing which the statute expressly permitted them to do, as the effect of giving the bond and taking the money. It was not admissible to look into what disposition they made of the fund after replevying it, for the purpose of estopping them from making defenses which the statutes gave them a right to make.

The judgment is reversed and judgment here entered in favor of appellants, quashing and dismissing the writ.

Reversed and rendered.

ROBERT M. TISON, INDEPENDENT EXECUTOR, v. LULU B. GASS ET AL.

Decided May 9, 1906.

Independent Executor—Appeal Bond Necessary—When.

An appeal bond is necessary by one who, when sued in his individual capacity and as independent executor and as beneficiary under the will, defends in his individual capacity alone, and against whom judgment is rendered personally.

Appeal from the District Court of Brazoria. Tried below before Hon. Wells Thompson.

No briefs for either party.

On motion to dismiss appeal.

NEILL, ASSOCIATE JUSTICE.—Lula B. Gass, a widow, brought this suit against Robert M. Tison, in his individual capacity and as independent executor of James W. Tison, deceased, and as beneficiary under said will in possession of the estate thereby bequeathed; and, also, against Annie E. Ransdell, joined by her husband, S. Y. Ransdell. Pending the suit, the plaintiff Lula B. Gass married T. E. Russell, who, by an amended original petition, was made a party plaintiff, and joined with his wife in the prosecution of the suit.

The purpose of the action was to establish a claim against the property of the estate of James W. Tison, deceased, in the possession of Robert M. Tison, held by him either as independent executor of said estate or individually—the claim being that the testator had invested certain funds of the separate estate of his wife, who was the mother of plaintiff, in the property held by defendant as his estate—and for a partition of the plaintiff's interest of her deceased mother's community property in the estate of James W. Tison and herself, which property was alleged to be in defendant's possession and claimed by him.

The defendant Robert M. Tison answered individually, but not in his representative capacity as independent executor. Indeed, it was "admitted" on the trial "by counsel for both parties that the will had been duly filed and probated; that the defendant Robert M. Tison had duly qualified and filed an inventory and appraisement, which had been approved by the Probate Court; that an order had been made and entered in the minutes of the Probate Court ordering the same to be dropped from the docket, and that it (the matter probate), had been dropped therefrom; and that the defendant Robert M. Tison has since been and is now claiming the property described in said inventory (which is the subject-matter of this suit), as his own by reason of said will, subject to the debts of the estate of J. W. Tison, deceased."

The judgment rendered, after stating the appearance of the plaintiffs, recites: "and the defendant, Robert M. Tison, appeared in person and also by his attorneys and announced ready for trial." Then, after stating, "the court is of the opinion that the questions of law and fact are with the plaintiffs," it proceeds as follows: "It is therefore ordered, adjudged and decreed by the court, that the plaintiffs, Mrs. T. E. Russell, joined by her husband, T. E. Russell, do have and recover of and from the defendant Robert M. Tison, and out of the property hereinafter described, the sum of fourteen hundred and twenty-five ($1425) dollars, with interest," etc. It then describes the property out of which the judgment is to be satisfied, and then states, "no judgment is rendered against Robert M. Tison personally except as to his interest in the property above described, and, after the execution against the above, orders no further amount shall be collected of said Robert M. Tison by reason of this judgment."

After the judgment appears the following entry and order: "To which judgment of the court defendant in open court excepts and gives notice of appeal to the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Galveston, Texas, and twenty days after adjournment of court are allowed defendant Robert M. Tison in which to file statement of facts and bills of exception."

The assignments of error, after stating the style and number of the case, are premised as follows: "Now comes the defendant Robert M. Tison, for himself and as independent executor of the estate of James W. Tison, deceased, and files the following assignments of error."

No appeal bond has been filed in the case; but appellant seeks to prosecute an appeal without bond as independent executor.

The grounds upon which this motion to dismiss is based are as follows: "Robert M. Tison, having failed to allege that he was defending in the court below as independent executor; but, on the contrary, admitted that he was not acting in such capacity, having taken no bills of exception at the trial to the judgment in the capacity of independent executor, nor having given notice of appeal as such executor, nor having asked twenty days after adjournment in which to prepare and file a statement of facts and bills of exception, he can not, now, by merely styling himself 'Independent Executor,' maintain this appeal—he, having given no appeal bond, and coming under none of the exceptions of the statute requiring bond, has failed to perfect his appeal."

It is apparent from the matters above stated from the record that the judgment sought to be appealed from is not against Robert M. Tison in his capacity of independent executor of the estate of James W. Tison, deceased; but that it is a judgment against him personally, restricted in its satisfaction to specific property, received by him and in his possession, formerly of the estate of the decedent, but now owned and claimed by him in his individual capacity; and that every step taken towards an appeal from the judgment, up to the time of filing the assignments of error, was taken by him as an individual and not as the executor of the testator's estate.

The defendant not having appealed in his capacity of independent executor from the judgment of the District Court, was required by articles 1400, 1401, 1402 and 1408 of Revised Statutes to give bond, or make affidavit in lieu thereof, as other appellants. (Logan v. Gay, 15 Texas Ct. Rep., 304.) Therefore, the motion is granted and the appeal dismissed.

Dismissed.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY v. LEO BLAKE.

Decided May 9, 1906.

Killing of Dog by Railway Train.

Facts considered, and held insufficient to show negligence on defendant's part, or if negligence, that it was the proximate cause of the killing.

Appeal from District Court of Jasper. Tried below before Hon. W. B. Powell.

J. W. Terry, F. J. Duff and *A. L. Davis,* for appellant.—A railway company is not required to fence against dogs, and in order to recover for the killing of a dog, plaintiff must show negligence on the part of the railway company. Texas & P. Ry. Co. v. Scott, 4 Texas Apps. Civ., sec. 277, p. 476; Texas & P. Ry. Co. v. Scrivener, 49 S. W. Rep., 649; Southern, etc., Ry. Co. v. Cooper, 75 S. W. Rep., 329; Missouri, K. & T. Ry. Co. v. Willis, 17 Texas Civ. App., 230; Gulf, C. & S. F. Ry. Co. v. Blanchenbeckler, 13 Texas Civ. App., 251.

In an action to recover damages against a railway company for killing an animal against which the company is not required to fence, the plaintiff must show not only negligence on the part of the company, but that such negligence was the proximate cause of the killing. San Antonio & A. P. Ry. Co. v. Clark, 62 S. W. Rep., 546; San Antonio & A. P. Ry. Co. v. Clark, 26 Texas Civ. App., 280; Missouri, K. & T. Ry. Co. v. Morris, 63 S. W. Rep., 888.

The court erred in rendering judgment against defendant for any amount because there was no sufficient evidence before the court as to the value of the dog killed. Houston & T. C. Ry. Co. v. Williams, 31 S. W. Rep., 559; Gulf, C. & S. F. Ry. Co. v. Dunman, 4 Texas Apps. Civ., sec. 99; 5 Am. & Eng. Ency. of Law (new ed.), 375.

The mere statement of a witness that an article or animal is worth a certain sum is not competent to prove intrinsic value. International & G. N. Ry. Co. v. Nicholson, 61 Texas, 553; Galveston, H. & S. A. Ry. Co. v. Davis, 1 Texas Apps. Civ., sec. 147; Galveston, H. & S. A. Ry. Co. v. Schrader, 1 Texas Apps. Civ., sec. 1147; State Bank v. Ford, 27 N. C., 698; Hutchinson on Carriers, sec. 770b.

The court erred in admitting over the objection of defendant testimony as to the intrinsic value of the dog alleged to have been killed by the defendant in the absence of any sufficient testimony to show that there was no market value for the dog at the time and place where and when it was killed.

W. W. Blake, for appellee.—While a railroad company is not required to fence its tracks at road crossings and near depots, nor against dogs, they are required to use ordinary care to avoid accidents and damage to others near crossings and depots, and operating a train at a high rate of speed within the yard limits, crossing a road near a depot, without the usual signals, is negligence per se. Marshall v. Dallas Con. Ry. Co., 73 S. W. Rep., 63; St. Louis, A. & T. Ry. Co. v. Hanks, 78 Texas, 304; Houston & T. C. Ry. Co. v. Terry, 42 Texas, 451; Galveston, H. & S. A. Ry. Co. v. Matula, 15 S. W. Rep., 575; Houston & T. C. Ry. Co. v. Loughbridge, 1 Texas App. Civ., 755; Jackson v. Kansas C. Ft. S. & M. Ry. Co., 58 S. W. Rep., 38; Grand Trunk Ry. v. Ives, 144 U. S., 419; Cyc., vol. 16, p. 922.

When plaintiff makes a prima facie case of negligence, the burden of proof is shifted to defendant to show that the usual precautions were used to avoid or prevent accidents. Or to show proper and ordinary care in the particular case. 16 Cyc., 937; International & G. N. Ry. Co. v. Timmermann, 61 Texas, 660; Gulf, C. & S. F. Ry. Co. v. Benson, 69 Texas, 408.

In the absence of any proof of any market value for property destroyed

by a railroad, then the special or intrinsic value of the property, as shown by the testimony, will become the measure of damages, and opinions of witnesses are sufficient to establish the amount of damages. "That measure of damages should be adopted in each case which will most nearly compensate for the loss sustained." Cluck v. Houston & T. C. Ry. Co., 9 Texas Ct. Rep., 189; Webb v. Daggett, 13 Texas Ct. Rep., 294; Highland v. Houston, E. & W. T. Ry. Co., 65 S W. Rep., 650; Houston & T. C. R. R. Co. v. Knapp, 51 Texas, 600; Fort Worth, etc., v. Hogsett, 67 Texas, 687.

NEILL, ASSOCIATE JUSTICE.—The appellee sued appellant in the Justice's Court to recover damages for the alleged killing of his hound dog of the Walker breed, named Whiskey. He recovered twenty-five dollars for Whiskey in the Justice's Court, and, on appeal to the District Court, fifty.

The evidence shows that Whiskey was a mighty fine fox hound and well trained for his age, for he was hardly a year old when killed. When last seen alive he was standing lazily in dreamy hound-like meditation near appellant's railroad track. When next seen his head was off and his body mangled, for he had been struck and run over by a railway train near the place where he had been seen standing. There was no eye-witness to Whiskey's death, or if there were he never appeared or was called as a witness on the trial. So we don't know who's to blame for the catastrophe—the appellant or Whiskey. The court found as a fact that the engineer negligently failed to whistle for Whiskey, but there is no evidence whatever in the record that such is the fact, unless it can be inferred that engineers never whistle for Whiskey. Though it has been held by the Supreme Court of Tennessee that a dog is such an animal as the statute contemplates where it requires the whistle shall be sounded when they are seen upon the track, but that the engineer is not required to whistle separately for each particular dog in a pack in full cry in a fox chase along a railroad. For this, says the court, would be requiring too great diligence of the engineer, especially as he has no means of informing each dog that any special whistle is sounded for him. (Fink v. Evans, 95 Tenn., 413.)

There is, however, evidence in the record tending to sustain the court's finding that the train which "struck the noble hound" was running at an unusual high rate of speed. This, it has been held may be considered for what it is worth, as an act of negligence when the train is passing over a portion of the track where it is likely animals may be found upon it. (Gulf, C. & S. F. Ry. Co. v. Anson, 82 S. W. Rep., 785.) In this particular case we are somewhat puzzled to estimate the worth of such fact. For it stands alone as the only act of negligence of the railway company upon which there is any evidence at all. Is it sufficient to support the judgment? Though negligence be proven, unless it is shown to be the proximate cause of the act upon which the damage sought to be recovered is predicated it is insufficient to sustain an action. It is manifest that the rapid speed of the train was not necessarily the efficient cause of the dog's death; for, whether it was running slow or fast, it is evident the dog would have been killed if struck and run over by the engine. No facts were proven which would tend to show that he

would not have been killed if the train had not exceeded its ordinary rate of speed. It was incumbent upon the appellant to show this, for the burden was upon him to show that appellant's negligence was the proximate cause of the dog's being killed.

The proximate cause of an event is that which, in a natural and continuous sequence, unbroken by any new, independent cause produces the event, and without which the event would not have occurred. From the evidence before us it can not be said that rapid speed of the train (conceding it to be negligence) in a natural and continuous sequence, unbroken by any new, independent cause produced Whiskey's death, and that without it his death would not have occurred. While a person guilty of negligence is held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed would, at the time of the negligent act, have thought reasonably possible to follow, if they had occurred to his mind; still, it does not appear what the circumstances were which in fact existed at the time the engine was being run at an excessive rate of speed or that the engineer was acquainted with them. There is nothing to show when the dog went upon the track, or that the engineer could have reasonably anticipated his going upon it at the time and place he did. There is nothing tending to show discovered peril of the dog; nor, if his peril was discovered, that his being run over could have been prevented by the use of every means at hand to stop the train. All the facts and circumstances lie wholly within a field of conjecture; and no one can say with the slightest degree of certainty what they probably were. We have the fast running of the train and a dead dog. That's all. This is not enough. For the death of the dog must be proven to be the proximate result of appellant's negligence, and a guess can not be substituted for such proof.

While dogs are regarded property in this State, they are not generally on the market; and, ordinarily, have no market value, though they may be, in some instances, of value to the owner. This value to the owner is all that can ordinarily be proven, and is the measure of the owner's loss or damage when his dog is negligently killed by another. In view of this we are not prepared to say that the evidence was not sufficient to prove the damages assessed by the trial court.

Because the evidence is insufficient to show with any degree of certainty that Whiskey's death was proximately caused by the negligence of the defendant, the judgment is reversed and the cause remanded.

Reversed and remanded.

THE GILBERT BOOK COMPANY v. B. F. PYE.

Decided May 9, 1906.

Garnishment—Jurisdiction—Defective Writ.

The validity of a writ of garnishment depends upon pursuing the steps prescribed by law. A garnishee can not accept service, or voluntarily answer, or waive defects so as to affect the right of the defendant in the original suit. A writ of garnishment, in which the date on which the garnishee was required to appear and answer, was left blank, was void, and conferred no jurisdiction on the court over the property of the defendant in the hands of the garnishee.

Appeal from the County Court of Jefferson. Tried below before Hon. D. P. Wheat.

Teagle & Conley, G. P. Dougherty and *Fleming & Fleming,* for appellants.—The service of the process beyond the limits of the State upon a nonresident of the State, in which the court sits, will not confer jurisdiction upon the court to render a personal judgment, and a personal judgment rendered upon such service of process is absolutely void. Pennoyer v. Neff, 95 U. S., 714; Maddox v. Craig, 80 Texas, 600.

In order to support a judgment by default, the process issued and served, must comply strictly with the statutes, and the defendant can avail himself of the defects in the process, by appeal or writ of error from such default judgment, and this rule applies to action in rem. Covington v. Burleson, 28 Texas, 368; Durham v. Betterson, 79 Texas, 223; Davidson v. Heidenheimer, 2 Posey, 492; Caspary v. Greely-Burnham Grocery Co., 3 Texas App. Civ. Cases, sec, 175; Rev. Stats., 220, 1214; Harrell v. Mexico Cattle Co., 73 Texas, 616; City of Sherman v. Shobe, 94 Texas, 131.

Xavier Ryan, for appellee.—Cited, Rev. Stats., art. 1234, 1504a; Wilson v. National Bank of Cleburne, 63 S. W. Rep., 1067; Irwin v. Bexar County, 63 S. W. Rep., 550; Rice v. Peteet, 66 Texas, 568.

NEILL, ASSOCIATE JUSTICE.—This suit was instituted in the County Court of Jefferson County on March 4, 1905, by B. F. Pye against the Gilbert Book Company and Fleming & Fleming, a partnership composed of M. A. & J. V. Fleming to recover the sum of $300.50. A writ of garnishment was issue in the case, on proper application, garnisheeing funds of defendants in the possession of the Park Bank and Trust Company of Beaumont, Texas. The Gilbert Book Company failed to answer, and a judgment by default was rendered against it. The defendants Fleming & Fleming, answered by a general denial and plea of reconvention against B. F. Pye for damages for wrongfully suing out the writ of garnishment. On the 6th day of June, 1905, the judgment by default against the Gilbert Book Company was made final, and the plaintiff's suit against Fleming & Fleming, as well as their plea in reconvention, was dismissed. The judgment was for $105.00 against the Gilbert Book Company; and for the same amount on the garnishment proceedings, against Fleming & Fleming and the sureties on their replevy bond, who had replevied the funds garnisheed.

From this judgment the Gilbert Book Company and Fleming & Fleming have appealed.

This assignment of error: "The court erred in rendering any judgment by default against the Gilbert Book Company because it was a nonresident of the State of Texas, and was served with process beyond the limits of the State, and the court was without power to render any personal judgment, and could have acquired jurisdiction to render a judgment in rem only by the service of a valid writ of garnishment upon the Park Bank and Trust Company, and said writ of garnishment, as served, was defective and void as it failed to give the date on which

the garnishee was required to answer as required by law," if well taken is conclusive of this appeal.

The matters pertinent to this assignment, appearing from the record, are: (1) that the Gilbert Book Company is a joint stock association having its place of business in St. Louis, State of Missouri, and was served in said city and State with a true copy of notice of the suit and with a certified copy of plaintiff's petition accompanying the same on the 21st of March, 1905, in accordance with article 1230, Revised Statutes of 1895; (2) that said Book Company never appeared nor answered in the case; (3) that when the suit was instituted (the 4th of March, 1905) a writ of garnishment was issued on a proper application against the Park Bank and Trust Company by which the sheriff or any constable of Jefferson County, Texas, was "commanded forthwith to summon said Park Bank & Trust Company . . . to be and appear before the said court at the next term thereof to be held in Beaumont in said County on the — day of ——, A. D. 1905, then and there to answer under oath what, if anything, it is indebted to the said Gilbert Book Company and Fleming & Fleming (a firm composed of M. A. Fleming and J. V. Fleming) or either of them," etc.; (4) that said writ of garnishment was duly served on the garnishee on the 4th day of March, 1905; (5) that on the 15th day of March, 1905, the Park Bank and Trust Company filed its answer in the case in which, after negativing all other grounds upon which it could be held liable as a garnishee, alleged "that at the time of the service of said writ . . . defendants Fleming & Fleming had with this garnishee and on deposit with it, in the regular course of its corporation business, the sum of $304.42 subject to the demand of defendants Fleming & Fleming;" (6) that this answer of the garnishee was controverted by the plaintiff by his alleging "that he has good reason to believe and does believe that the answer . . . is incorrect, in that the funds named and specified therein as being held in possession of said garnishee as the funds of Fleming & Fleming are in truth and fact the funds of the Gilbert Book Company, and are not the property of Fleming & Fleming as alleged in said answer;" (7) that upon the trial of the issue thus raised between the plaintiff and the garnishee, the court found that the funds in question were the property of the Gilbert Book Company, and entered judgment subjecting $105.00 thereof to the judgment for that amount which had been rendered by default against said company.

From these matters, it is apparent that the County Court had no jurisdiction over the person of the Gilbert Book Company, and that the only judgment that could be rendered against the company would be *in rem.* Whether it had jurisdiction to render a judgment of this character depends upon whether it, under the garnishment proceedings, obtained jurisdiction over the funds of the company in the possession of the garnishee.

The right of attachment by garnishment depends wholly upon the provisions of the statute for its validity and effect, and it can not be extended beyond the strict provision thereof. Its validity depends upon pursuing the steps prescribed by law for its prosecution and no aid can be lent it by the voluntary acts of the garnishee. If the garnishee is not legally served nothing has been attached by the process of garnish-

ment. For it is essential in order to bind the creditor (the principal defendant) whose claim is sought to be appropriated by process of garnishment that there should be service thereof, and such principal defendant will not be bound by an answer of the garnishee if he has not been served with valid process of garnishment. (Shinn on Attach. & Garn., secs. 485, 603.)

A garnishee can not accept service or voluntarily answer so as to affect the right of the defendant in the original suit or judgment or that of his creditors. The writ of garnishment takes effect, so as to fix a prior claim upon the fund which is sought to be reached, only by the service of the writ provided by law. Until this is done the garnishee can not in any manner be affected by the suit. (Harrell v. Cattle Co., 73 Texas, 610.) Where one owes a debt and is ready to pay it, he has no legal interest in the question whether it shall be paid to his creditor or to a plaintiff in garnishment proceeding. It is the defendant whose interest and right is involved, and if an irregularity is to be waived the waiver must come from him. The garnishee can not, as against the defendant in the original suit, even accept or waive service of the writ. (City of Sherman v. Shobe, 94 Texas, 131.) Nor can he, as against such defendant, by answering waive any defect or irregularity in the writ of garnishment. For the jurisdiction of a court over a man's property in possession of another, when no jurisdiction has been obtained over the person of the owner, can not be obtained by a waiver of a defect in the very process upon which its jurisdiction depends.

In view of these well-established principles, the crucial question is, Did the writ of garnishment issued in this case and served upon the Park Bank & Trust Company give the court jurisdiction over the fund of the Gilbert Book Company in the possession of the Bank & Trust Company when said writ was served?

Article 220, Revised Statutes of 1895, provides that, when certain prerequisites have been complied with, "the judge or clerk, or justice of the peace as the case may be, . . . shall immediately issue a writ of garnishment, directed to the sheriff or any constable of the county where the garnishee is alleged to be, commanding him forthwith to summons the garnishee to appear before the court out of which the same is issued, on the first day of the ensuing term thereof, to answer," etc.

It will be observed from our statement of matters pertinent to this assignment that the writ in this case summons the Park Bank & Trust Company to be and appear before said court "at the next regular term thereof to be held in Beaumont in said county on the day of —— A. D. 1905." Where "the general requirement of the statute is that he" (the garnishee) "must appear at or by a certain day, as 'the first day of the next term,' and when so specified, the statute is peremptory and must be obeyed and notice to appear at any other time will not give the court jurisdiction." (Shinn on Attach. & Garn., sec. 603. See also Rood on Garn., sec. 264.)

In Padden v. Moore, 58 Iowa, 703, cited in support of the text, it is said: "It is provided by section 2979 of the Code that the notice to the garnishee must require him 'to appear on the first day of next term of the court wherein the main cause is pending.' This appears to be a

peremtory provision of the law. A party cannot be required to appear as garnishee at any other time, any more than a party to an action can be required to appear in obedience to an original notice at any other time than that fixed by law. . . . There can be no doubt . . . that the garnishee, when called upon to appear and answer in court, should be by notice required to do so on the first day of the next term of the court from which the writ issues." It was then held that a judgment by default in a garnishment proceeding, where the writ of garnishment did not contain this requirement, was void.

In McDonald v. Vinnette, 58 Wis., 619, another case cited to support section 603 of Shinn on Attach. & Garn., it is said: "The statute gives no authority whatever to issue a summons returnable on any day other than the return day of the execution. The garnishee can not lawfully be required by the summons to appear and answer touching his liability any other day. A departure from the statute of a single day is as fatal to the proceeding as one of a month or three months. . . . The municipal judge could only take jurisdiction of the garnishee defendant upon a summons issued and made returnable as the statute requires, and duly served."

Again, in Elder v. Hasche, 31 N. W. Rep., 58, it is said: "In ordinary actions, of course, a party may waive process, make voluntary appearance, and submit to the jurisdiction of the court. 'But this right a garnishee, as such, has not. He can not voluntarily appear, and substitute his creditor's creditor for his own, because that goes to the jurisdiction of the subject, not to the jurisdiction of his person.' It is elementary that the proceeding of garnishment is special, in derogation of the common law, and that the statute must be strictly pursued in order to confer jurisdiction. . . . The court could only acquire jurisdiction . . . by service and return of process as the statute required."

This whole matter is epitomized by Rood on Garnishment, sec. 271, where it is said: "Appearance and submission under void service depend upon a personal right to waive service, which the garnishee, as such, does not possess. He can waive his own rights, but he can not waive the defendant's rights. He can not voluntarily appear and substitute his creditor's creditor for his own, because that goes to the jurisdiction of the subject matter, not to the jurisdiction of the person. Fatal defects in the service or process can not be cured by any act of the garnishee."

In view of the principles cited we hold that the writ of garnishment issued in this case and served on the Park Bank & Trust Company was defective, in that it failed to require the garnishee to appear before the court out of which it issued on the *first day* of the ensuing term thereof, and therefore did not give the court jurisdiction of the fund of the Gilbert Book Company in the possession of the garnishee when the writ was served. From this it follows that the court had no jurisdiction to render a judgment *in rem*. subjecting said fund to plaintiff's demand, and, as it had no jurisdiction over the person of the Gilbert Book Company, the judgment is absolutely void. Wherefore, the judgment is reversed and the cause remanded.

Reversed and remanded.

M. GIMBLE & SONS v. C. S. KING ET AL.

Decided May 9, 1906.

Novation—Necessary Elements.

Novation is effected by the substitution of a new obligation between the same parties with the intention to extinguish the old one; or by the substitution of a new debtor with the intention to release the old one; or by the substitution of a new creditor with the intent to transfer the rights of the old one to him. In order to make a novation of the second class above mentioned, there must be a mutual agreement among the parties—the creditor, his immediate debtor and the new debtor—for the substitution of the new debt in the place and stead of the original debt.

Appeal from the County Court of Jefferson. Tried below before Hon. D. P. Wheat.

Fleming & Fleming, for appellant.—The court erred in refusing to instruct the jury, as requested by plaintiff, as follows: "You are instructed at the request of plaintiff to find in favor the plaintiff against both the defendants, C. S. King and W. H. Spurlock, the amount of $453, and in favor of the defendant, C. S. King, against the defendant, W. H. Spurlock, in the amount of $453, with interest as prayed for in plaintiff's petition. House v. Robertson, 89 Texas, 689; Thomas v. Hammond, 47 Texas, 43; James v. King & Davidson, 2 Texas App. Civ. Cas., 544; Taylor v. Merrill, 64 Texas, 494; Cyc., vol. 17, p. 693, subd. 17; Greenl. on Ev., sec. 284a; Rev. Stats., art. 2323; 22 Am. & Eng. Ency. of Law (2d ed.), pp. 563, 556; 2 Danl. on Neg. Inst., secs. 1259, 1262, 1272, 830; McGuire v. Bidwell, 64 Texas, 43; Otto v. Halff, 89 Texas, 384; McDonald v. Chinski, 23 Texas Civ. App., 505; Bank v. Border, 9 Texas Civ. App., 670.

Joe Williams and *G. P. Dougherty,* for appellee.—Where a written instrument is sued on, and in evidence, evidences a clear, positive and unconditional promise to pay, parol evidence of a contemporaneous parol agreement tending to show that said contract was conditional or contingent is not admissible. Dolson v. DeGonahl, 70 Texas, 620.

The unauthorized acts of agents are just as effectually ratified by the conduct of the principal with reference to said acts, and become as binding as would have been the case had the agent been expressly authorized to perform such acts in the beginning. Mecham on Agency, secs. 146-151; Ft. Worth Pub. Co. v. Hitson, 80 Texas, 216; Merchants Bank v. McAnulty, 31 S. W. Rep., 1091; Campbell v. Jenkins, 34 S. W. Rep., 673.

The acceptance by the creditor of a negotiable promissory note of a third party will operate as a payment as between the creditor and original debtor, unless there is an express understanding that the acceptance is not to have that effect, and especially when said note is extended as to time of payment without the knowledge or consent of original debtor. 22 Am. & Eng. Ency. of Law, 563; Campbell v. Jenkins, 34 S. W. Rep., 673.

FLY, ASSOCIATE JUSTICE.—Appellants instituted suit against C. S.

King, and W. H. Spurlock, to recover $453, alleging that they had sold King certain goods and merchandise whose value amounted in the aggregate to the sum specified, which he had agreed to pay, and that Spurlock had executed his promissory note for the same sum. The circumstances were alleged to be that Spurlock was indebted to King, and appellants were about to have a writ of garnishment served on him when he agreed to and did give the promissory note sued on.

King answered that he had purchased the goods from appellants and had sold them to Spurlock, who had agreed to assume the debt due appellants, and that the latter agreed to accept Spurlock's obligation to pay the debt and to release said King, and in pursuance of the agreement had accepted the note from Spurlock in payment for the goods. The court instructed the jury to return a verdict in favor of King and against Spurlock for the debt.

The uncontradicted evidence showed that the account against King was placed in the hands of an attorney who ascertained that Spurlock was indebted to King for goods sold to him, and he went to Spurlock and told him that suit would be instituted against King by appellants, and a writ of garnishment obtained against Spurlock. The latter told the attorney that he owed King and had agreed to pay the debt due appellants. He told the attorney that he did not have the cash but would give him a note for the amount. The note was given. There was no agreement on the part of appellants, who were in Chicago, nor on the part of the attorney to release King from liability. There was no agreement whatever made with King, nor any with Spurlock as to taking him for the debt instead of King, and the court must have concluded that the taking of the notes by appellants was in law a substitution of a new debtor in the place of King and that he was thereby released.

Novation is affected by the substitution of a new obligation between the same parties with the intention to extinguish the old one, or by the substitution of a new debtor with the intention to release the old one; or by the substitution of a new creditor with the intent to transfer the rights of the old one to him. Beach Mod. Con., sec. 786. If the facts make a case of novation it necessarily belongs to the second class, that of substituting a new debtor for the old one. In order to make a case of that kind there must be a mutual agreement among the parties, the creditor, his immediate debtor and the new debtor, for the substitution of the new debt in the place and stead of the original debt. Add. Con., p. 530. As said by that author, "the intention of the creditor to discharge the first debtor and to accept of the second in his stead, must be perfectly evident." Novation can only exist by mutual consent and agreement of all the interested parties, and it is subject to the same rules of evidence that obtain in regard to any other kind of contract.

Not only is it necessary to prove that the creditor took a new debtor, but it must be made to appear, in order to release the old debtor, that there was an extinguishment of the old debt and an agreement to look to the new debtor alone. The mere taking of a new debtor for the old debt, would not, standing alone be sufficient to show novation. (Pimental v. Marques (Cal.), 42 Pac. Rep., 159; Jackson Iron Co. v. Negaunee Concentrating Co., 65 Fed. Rep., 298.)

In the case of Stowell v. Gram, 69 N. E. Rep., 342, the Supreme

Judicial Court of Massachusetts held: "To establish a novation on which the plaintiffs can charge these defendants, it must be proved that the plaintiffs released Holt from his obligations under the contract, and agreed to look to the defendants alone, and that as a part of the same arrangement Holt released the plaintiffs from their liability to him, and that the defendants agreed with the plaintiffs to perform the contract as their own."

Again in the case of Western White Bronze Co. v. Portrey, 70 N. W. Rep., 383, the Supreme Court of Nebraska said: "There can be no novation in the absence of an unqualified discharge of the original debtor by the creditor." The facts of the last case are quite similar to those in this. (See also Piehl v. Piehl (Mich.), 101 N. W. Rep., 628.)

It is not contended that there was any agreement to release King, and the mere fact of putting the obligation of Spurlock in the form of a promissory note could not have had that effect. He was under obligation to pay the debt before that, because he had assumed it, and he so stated to the attorney of appellants, and all that was done by the transaction was to place that promise in writing. It is shown positively that there was no agreement of any kind made in regard to the note. There could under these circumstances be no novation, because a novation consists of a mutual agreement of all the parties to substitute a new debtor for the old one, in consideration of the extinguishment of the old debt. (Kelso v. Fleming (Ind.), 3 N. E. Rep., 830.)

We think the same rules are applicable to this case that would apply in case appellants had taken a note from King for the antecedent debt, and it is well settled that the taking of such a note would not extinguish the antecedent debt unless there was an agreement to that effect. If a draft or note be taken contemporaneously with the creation of the debt the presumption would prevail that it was taken in payment of the debt, but if a note or draft is taken for a precedent debt the presumption is that it was not taken as payment, and the burden of removing that presumption would rest on the party asserting it. (Gibson v. Toby, 53 Barb., 191; Hall v. Stevens, 116 N. Y., 209.) The mere taking of the note, without some evidence that it was taken in satisfaction of the debt, does not constitute a novation. (Am. & Eng. Enc. Law, 890; Noel v. Murray, 13 N. Y., 168; McLoughlin v. Bieber, 58 N. Y., 790.)

That part of the judgment as to Spurlock will not be disturbed, but the court erred in instructing a verdict for King, and the judgment as to him will be reversed and judgment here rendered that appellant recover of him the amount of the debt, interest and costs and that King recover over against Spurlock.

Reversed and rendered.

L. W. LEVY AND COMPANY ET AL. V. SOPHIA LEE LACOUR.

Decided May 11, 1906.

Urban Homestead—Detached Lot—Casual Use—Insufficient Evidence.

If a vacant detached lot in a town or city is principally used by the head of a family as a horse lot, cow lot or garden in connection with the home, it partakes of the exemption attaching to the residence; but the use upon which the exemption is predicated must be the principal use, and not a mere incidental or casual use. The fact that the agricultural products from the lot were sold and the money used to support the family will not make the lot a part of the homestead. Where the evidence showed that the husband was a saloonkeeper; that the cultivation of the lot in question was not his business; that the lot was rented to tenants on shares or cultivated mainly in staple crops like corn and cotton by his procurement, or was used occasionally for the pasture of his horses, cows and calves, it was manifest that the use of the lot in connection with the home was only casual, and such lot was therefore not exempt as a part of the homestead.

Appeal from the District Court of Liberty County. Tried below before Hon. L. B. Hightower.

Stevens & Pickett and *James B. & Charles J. Stubbs,* for appellants. —Cited, Wynne v. Hudson, 66 Texas, 1; Martin Clo. Co. v. Henly, 83 Texas, 594; Rogers v. Ragland, 42 Texas, 422; Equitable Mortgage Co. v. Norton, 71 Texas, 687; Keith v. Hyndman, 57 Texas, 431; Evans v. Womack, 48. Texas, 230; Achilles v. Willis & Bro., 81 Texas, 170; Iken & Co. v. Olenick, 42 Texas, 195; Allen v. Whitaker, 18 S. W. Rep., 161; George v. Ryon, 61 S. W. Rep., 138; Peregoy v. Kottwitz, 54 Texas, 497; Heatherly v. Little, 21 Texas Civ. App., 665; Haswell v. Forbes, 8 Texas Civ. App., 86.

No briefs for appellee.

GILL, CHIEF JUSTICE.—Sophia Lee Lacour brought this suit against her husband, J. V. Lacour, the firm of L. W. Levy & Co. and C. E. Selvage, trustee, to enjoin the sale of certain real estate covered by a deed of trust executed by her husband to secure the firm in the payment of a debt due by him to the firm. The ground upon which the injunction was sought was that the property covered by the trust deed was a part of the urban homestead of the plaintiff and her husband at the date of the execution of the deed of trust.

Charles H. Lacour intervened, claiming an undivided half interest in the property.

A trial to the court without a jury resulted in a judgment in favor of C. H. Lacour for an undivided half interest in the land; in favor of J. V. Lacour as to the other half; in favor of plaintiff upon her homestead claim. The deed of trust insofar as it affected the property in question was canceled, and the preliminary injunction perpetuated.

From the judgment on the issue of homestead, Levy & Co. and Selvage, the trustee, have appealed and here assail this feature of the judgment on the ground that it is unsupported by the evidence. We

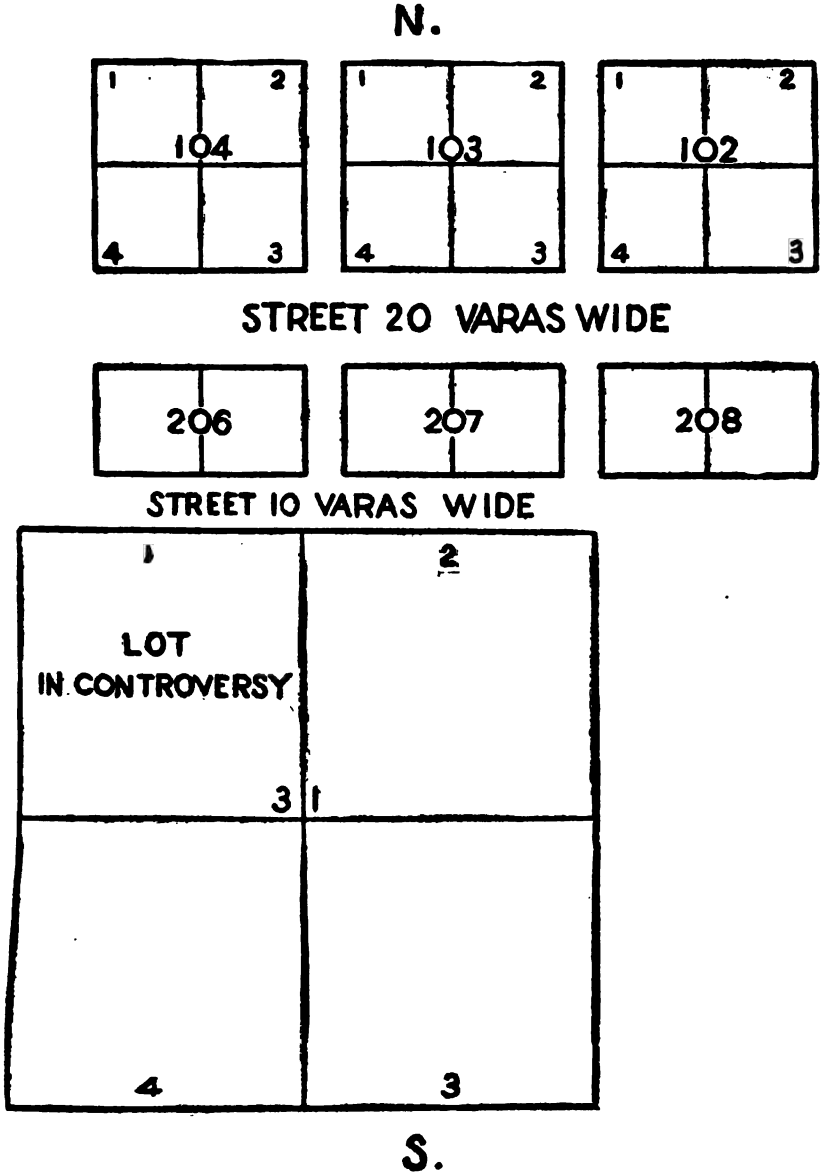
think the assignment presenting the question should be sustained. The facts are as follows:

J. V. Lacour is the owner of block 104 in the town of Liberty, Texas, containing about 3½ acres, and an undivided half interest in lot 1 in block 31, the latter containing 12 ac. . Charles H. Lacour is the owner of the other undivided half by reason of the fact that the property was part of the community estate of his deceased mother and his father J. V. Lacour. Sophia Lee Lacour is the second wife of J. V. Lacour, and block 104 on which the residence is situate is unquestionably their homestead.

She claimed that the 12 acre lot in block 31 was a part of the homestead on the theory that it was used in connection with the residence lots for the comfort and convenience of the family. Upon the truth and effectiveness of this claim depends the validity of the judgment. The facts bearing upon the issue are as follows:

Upon the residence lots Lacour maintained a horse lot, cow lot, garden and a small field. He had had the 12 acres fenced for years. Some years it was cultivated by tenants for part of the crop. One year it was rented for money rent, and some years Lacour cultivated it himself or used it merely for a pasture for his stock and calves. When cultivated the crops raised were cotton and corn and sweet and Irish potatoes and cane. These latter were used to supply the family. The cotton and corn were used to support the family. The evidence does not show to what extent the land was planted in potatoes and cane. The wife testified that they farmed on lot 1 in block 31.

The following plat introduced by plaintiff discloses the location of the property with reference to the residence, which latter is on lot 1 and 2 in block 104:



The deed of trust was executed by the husband alone on the 4th day of June, 1904, and was accepted by Levy & Co. without any notice that the 12 acre tract described as lot 1 in block 31 was claimed as a part of the Lacour home except such notice as the character of use to which it had been and was being put conveyed to them. The fact that it was detached from the residence lots can make no difference in the force of

plaintiff's claim if the uses to which it was subjected gave it the character of homestead property.

But it is equally well settled that the use upon which the homestead claim is predicated must be the principal use and not a mere incidental or casual use. If a vacant detached lot is principally used by the head of a family in a town or city as a horse lot or cow lot or garden in connection with the home it partakes of the exemption attaching to the residence. The fact that the products of the 12 acre lot were sold and the money used to support the family will not support the homestead claim. (Keither v. Hyndman, 57 Texas, 431; Evans v. Womack, 48 Texas, 230; Allen v. Whitaker, 18 S. W. Rep., 162.) To be effective its principal use must be in connection with the home and for the comfort and convenience of the family. (Heatherly v. Little, 52 S. W. Rep., 980; Blum v. Rogers, 78 Texas, 530.)

Plaintiff has failed to bring her case within the rule. Her husband's occupation was a saloon-keeper. The cultivation of the 12 acres was not his business. It was rented to tenants on the shares, or cultivated mainly in staple crops like corn and cotton by his procurement, or else was used occasionally for the pasture of his horses, cows and calves. The evidence in our opinion not only fails to show that the 12 acre lot was used in such a way as to make it a part of the homestead, but further shows that Lacour and family had a cow lot, horse lot, garden and a little field on block 104 used in connection with the residence.

For the reasons given the judgment as to the issue of homestead is reversed and the cause remanded. The judgment in favor of C. H. Lacour is unassailed and is therefore not disturbed.

Reversed and remanded.

GRAVITY CANAL COMPANY v. C. L. J. SISK ET AL.

Decided May 11, 1906.

1.—Sequestration—Motion to Quash.

A motion to quash a writ of sequestration may be filed and acted on at any time before the case is disposed of.

2.—Same—Description of Property.

It appeared from the application for sequestration that plaintiff claimed an undivided portion of a crop, and that such portion had not been designated or set apart to plaintiff in any way by which it could be identified. Held, the sequestration proceedings were properly quashed on the ground that the property sought to be subjected to the writ was not sufficiently described to enable the officer to identify it.

3.—Written Contract—Parol Evidence—Interpretation.

It was error to exclude evidence offered by plaintiff to show that its failure to irrigate defendants rice crop was due to the failure of defendant's landlord to keep in repair a lateral ditch which said landlord had agreed to do when renting the land to defendants. This evidence would not have varied the written contract between plaintiff and defendants, but only shown the circumstances under which it was executed.

Error from the District Court of Matagorda County. Tried below before Hon. Jesse Matthews.

Gaines & Corbett, for plaintiff in error.—The contract showing that

the canal company's portion of the rice became its absolute and separate property as soon as it left the threshing machine, and it being impossible to sequester sacks of rice before it was threshed, there was no executory contract but an absolute right of possession and absolute ownership in the plaintiff. Griffin v. Chubb, 7 Texas, 613; Brewer v. Blanton, 66 Texas, 533; Robertson v. Hunt, 77 Texas, 321; Tillman v. Janks, 4 Texas App. Civ., p. 245; Anderson v. Levyson, 1 Texas App. Civ., pp. 521, 522; Watt v. Overstreet, 78 Texas, 572.

The property sought to be sequestered was described in the affidavit as completely as it was possible to describe it, and the description was sufficient to identify and distinguish it. Hopkins v. Partridge, 71 Texas, 606; Anderson v. Levyson, 1 Texas App. Civ., p. 521; Clopton v. Goodbar, 55 S. W. Rep., 972.

It was error in the court to refuse to charge the jury as to the contract requiring five days notice in writing, said provision not being pleaded or proven unreasonable, and not having been pleaded as waived, and no consideration being shown for waiving the provision. Greene's Digest, vol. 2, p. 4654; Porter v. Heath, 2 Texas App. Civ., 115; Texas Banking Co. v. Hutchins, 53 Texas, 70; Merchants' Ins. Co. v. Dwyer, 1 Posey's U. C., p. 449; Security Co. v. Caruthers, 32 S. W. Rep., 841; East Texas Fire Ins. Co. v. Brown, 82 Texas, 636.

J. W. Conger and *W. C. Carpenter,* for defendant in error.—A motion to quash may be filed and acted on at any time before the case is disposed of. Wheeler v. Wheeler, 65 Texas, 576.

The court did not err in quashing the sequestration proceedings, (1) because the contract was executory. Cleveland v. Williams, 29 Texas, 204; Morgan v. Taylor, 32 Texas, 363; Allen v. Milton, 64 Texas, 218; Boaz v. Snyder, 69 Texas, 128; Woods v. Halff, W. & Co., 44 Texas, 633. (2) Because the description was insufficient. Huckins v. Leitner, 4 Texas App. Civ. Cases, sec. 16; Rev. Stats., art. 4865, par. 3; Morgan v. Turner, 4 Texas Civ. App., 198.

PLEASANTS, ASSOCIATE JUSTICE.—The Gravity Canal Company brought this suit against C. L. J. Sisk and J. L. Phelps to recover one-fifth of the rice grown by the defendants in the year 1904 upon a tract of land in Matagorda County, described in the petition.

The suit is based upon a written contract executed by plaintiff and the defendants, by the terms of which plaintiff undertook, upon certain conditions named in said contract, "to use its best endeavors" to furnish a sufficient quantity of water through its canal and laterals to properly irrigate the rice planted by defendants on said land, and in consideration of such agreement and undertaking by plaintiff the defendants agreed and promised to deliver to plaintiff, as compensation for its service in furnishing the water, one-fifth of all the rice raised by them on said land.

The petition alleges that plaintiff fully complied with its contract, but defendants have failed and refused to deliver to plaintiff the rice due it thereunder. The quality and value of the rice due plaintiff under the contract is alleged, and judgment is asked for said rice or its value.

At the time this petition was filed plaintiff applied for and obtained

a writ of sequestration which it caused to be levied upon 58 sacks of rough rice valued by the officer making the levy at $116. The rice levied on under this writ was replevied by the defendants by the execution of a replevy bond as provided by the statute.

The defendants demurred generally and specially to the petition, and, answering by special plea, admitted the execution of the contract as alleged in the petition, but averred that plaintiff had failed to comply with its contract to furnish sufficient water for the irrigation of their rice crop, and by reason thereof all of the rice planted by them, except that on about 35 acres of their land, died, and they were thereby damaged in the sum of $800 for which amount they prayed judgment against the plaintiff.

After the parties had announced ready for trial defendants presented a motion to quash the affidavit and writ of sequestration which was sustained by the court.

The trial by a jury resulted in a verdict and judgment in favor of defendants on their cross-action against plaintiff for the sum of $600.

The contract sued on contains the following provisions:

"That the said party of the first part hereby covenants and agrees to use its best endeavors to furnish a sufficient quantity of water through its canal and laterals, in addition to the natural rainfall, to properly irrigate the rice planted by second party (provided there shall be reasonable stand) on the following described lands, to wit: about — acres in the south side of the Lewis & Robertson survey out of the Devine League, Matagorda County, Texas."

"Said first party agrees to use diligence in furnishing water for irrigation, but in case of accident to its machinery; injury to its canal (beyond its control); failure of its water supply, or through the acts of God it is unable to furnish water as agreed, first party shall not be held in damages, but shall be under obligation to use diligence to make the needed repairs; but if said first party negligently or intentionally fails to water the above described land according to the terms of this contract, then second party agrees that the measure of damages shall not exceed $4 per acre for each acre having a stand and not being watered."

"Said party agrees to pay the first party as full compensation for water furnished for his crop during 1904 one-fifth of the rice at each setting of the machine, sewed in new sacks; and it is especially agreed that the canal company's portion becomes its absolute and separate property as soon as it leaves the threshing machine."

"Said second party agrees to give the company at least five days notice in writing when water is desired, either by delivering said notice in person or mailing same."

The application for sequestration describes the property claimed by plaintiff as follows:

"One-fifth of all the rice grown by C. L. J. Sisk and J. L. Phelps on about two hundred acres of land out of and a part of the Silvey league of land in Matagorda County, Texas, and being out of the southern side of the land commonly known as the Lewis & Robertson survey out of said Silvey league; that said rice is now being threshed, sacked and sewed, and plaintiff's share of said rice will aggregate about 200 sacks

of rice of the value of $2 per sack for each and every one of said sacks; that plaintiff is the owner of said 200 sacks of rice, or one-fifth of all the rice raised on said land, and is entitled to the possession thereof. That all of this property is situated in Matagorda County, Texas, and that such property is worth in the aggregate $400."

The motion to quash the application and writ of sequestration was made on the ground, among others, that the description of the property contained in the application did not sufficiently identify it in that the contract sued on was only an executory contract of sale, and the title to the rice due plaintiff thereunder did not pass to it until said rice was threshed and sacked, and there was no description given by which the one-fifth part of the rice produced at each setting of the thresher could be identified by the officer, or distinguished from the mass of rice of which it was a part.

We shall not consider catagorically the various assignments presented in appellant's brief, but will, in a general way, dispose of all the questions raised which we deem material.

There was no error in overruling the general demurrer to defendants' cross-bill. The land upon which defendants' crop of rice was planted is described in the petition as "about 200 acres out of the south side of the Lewis and Robertson survey out of the Silvey league of land in Matagorda County" and the cross-bill described the crop of rice, for injury to which defendants sought to recover damages, as that planted by them upon the land described in plaintiff's petition. We think this description was sufficient to identify the crop of rice in controversy, a more accurate description of the land for that purpose being unnecessary.

A motion to quash auxiliary proceedings by sequestration is not required to be filed or presented before pleas to the merits, but may be filed and acted upon at any time before the case is disposed of, and the trial court did not err in entertaining defendants' motion to quash the sequestration proceedings in this case after the parties had announced ready for trial and a jury had been demanded by the defendants. (Wheeler v. Wheeler, 65 Texas, 573.)

We think the objection to the application for sequestration, on the ground that the property sought to be subjected to the writ was not sufficiently described to enable the officer to identify it, was valid, and the trial court properly sustained the motion to quash the sequestration proceedings on that ground. It is clear, under the contract sued on, that plaintiff had no title to any of the rice until it was threshed and sacked and plaintiff's one-fifth portion designated and set apart to it. (Cleveland v. Williams, 29 Texas, 204; Allen & Bro. v. Melton, 64 Texas, 218; Boaz & Co. v. Schneider & Davis, 69 Texas, 128.) The application not only fails to describe a segregated portion of the rice, but negatives the idea that it had been threshed or that any specific portion of it had been designated or set apart to plaintiff in any way by which it could be identified, and a writ is asked directing the officer to seize and take into his possession an undivided one-fifth of all the rice grown by the defendants upon a described tract of land. Under such a writ the officer would be called upon to partition the property, and this he was not authorized to do.

Upon the trial the plaintiff offered evidence to show that the land

cultivated by defendants was rented by them from R. W. Lewis and was situated one-fourth of a mile distant from the nearest lateral of plaintiff's irrigating plant, and that it was understood between plaintiff and defendants at the time the contract was made that the water to irrigate defendants' crop was to be conveyed to them through a lateral owned by Lewis and extending across his farm from the land leased by defendants to a connection with plaintiff's canal which was contiguous to the Lewis farm; and further, that the failure of plaintiff to furnish sufficient water for defendants' crop was due entirely to the fact that their landlord permitted his lateral to become and remain in such condition that water could not be conveyed through it to that portion of his farm upon which defendants' crop was situate, and that defendants had admitted that plaintiff had done everything in reason to water their crop and it was not plaintiff's fault that the crop was not sufficiently irrigated but the fault of their landlord, Lewis, in not complying with his rental contract which required him to keep the lateral, through which defendants' crop was to be supplied with water, in good condition.

We think this evidence was improperly excluded. The contract does not in express terms require plaintiff to provide the means of conveying the water to the land leased by defendants, and if defendants had a contract with the landlord by which he obligated himself to keep the lateral connecting the land rented by them with the plaintiff's canal in repair, and the contract between plaintiff and defendants only contemplated that plaintiff should furnish water to defendants through this lateral, which it was under no obligation to keep in repair and over which it had no control, it could not be held liable for the insufficient supply of water due entirely to the failure of Lewis to keep his lateral in repair. This evidence would not have varied the terms of the written contract, but would have interpreted and explained its provisions as to the extent of plaintiff's undertaking by showing the circumstances under which it was executed and the relation of the parties to its subject matter.

The evidence shows that no written demand was made by the defendants on plaintiff to furnish water for their rice until the 15th day of June and that at the time such demand was made a portion of defendants' crop had perished for lack of water. Upon this state of facts the plaintiff requested the court to instruct the jury that they should not in arriving at their verdict consider any damage to defendants' crop by reason of the failure of plaintiff to furnish water therefor which accrued prior to five days after written demand for the water was made by the defendants. This charge should have been given. The contract limits plaintiff's liability for damages to its failure to furnish water after a written demand therefor had been made by the defendants, and there is neither pleading nor evidence to sustain the defendants' contention that this provision of the contract had been waived by the plaintiff.

If the various assignments presented in the brief show any other error it is not such as is likely to occur upon another trial and it is unnecessary to discuss the remaining questions presented in the brief.

Because of the errors above indicated, the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

WILLIAM GAMMON ET AL. v. SIGEL & COHEN.

Decided May 12, 1906.

1.—Defective Briefs—Assignments not Considered.

When assignments of error involving distinct and independent questions are merely copied into the brief and submitted as propositions, with a statement at the foot of each, "See statement of facts, ante," referring to a preliminary statement of the facts in the brief, such assignments will not be considered.

2.—Rental Contract—Waiver of Forfeiture.

Where a written rental contract contained a provision for reentry by the landlord in case of default in payment of rent when due, a demand for the rent after default was a waiver of the forfeiture.

Appeal from the District Court of Galveston County. Tried below before Hon. Robert G. Street.

Maco & Minor Stewart, for appellants.

James B. & Charles J. Stubbs, for appellees.

REESE, ASSOCIATE JUSTICE.—On June 6, 1903, Sigel & Cohen leased from the Tremont & Windsor Hotel Company, for a term of ten years, a piece of ground in the city of Galveston lying between the sea wall and the line of mean high tide. The rental agreed upon was $1,500, payable in ten equal annual payments of $150 in advance, on the 15th of June, 1903, and annually thereafter on the 15th of June of each year during the continuance of the lease. The lease contract was in writing and contained a provision for re-entry upon default in payment of the rent due. This lease was transferred, with the property, by the Tremont & Windsor Hotel Company to William Gammon and George S. Ewalt. The second installment of rent due June 15, 1904, not being paid when due, plaintiffs Gammon and Ewalt instituted this suit on September 4, 1904, to cancel and annul the lease.

The cause was tried without a jury and judgment rendered for defendants from which plaintiffs appeal.

In appellant's brief the twelve assignments of error are submitted as propositions by merely copying the assignments from the record. No attempt is made to present each assignment separately, or to group those which might properly be so treated. The assignments involve several distinct and independent propositions not germaine to each other. There is no attempt to subjoin to each assignment, or to each proper group of assignments, a statement from the record of the matters relied on in support thereof. The assignments are merely copied into the brief with a statement at the foot, "See statement of facts ante," referring to a preliminary statement of the facts in the brief. None of the assignments of error so presented can be considered.

The trial court found that the plaintiff had made demand for the rent after the 15th of June, the date when it was due for the next ensuing year, which was a waiver of the forfeiture. We find no error apparent in the record and the judgment of the trial court is therefore affirmed.

Affirmed.

Writ of error refused.

L. A. BEDFORD AND J. M. BATES v. GEO. C. STONE ET AL.

Decided May 12, 1906.

1.—Regular Judge and Special Judge—Contemporaneous Sessions—Legality.

The fact that the regular district judge and a special district judge, duly authorized to act in the particular case, were holding their respective courts at the same time and in the same courthouse, does not of itself render the proceedings before the special judge void, and a judgment rendered by the special judge under such circumstances will be reversed only when it is made to appear that the appellant was, by reason of such facts, deprived of some valuable right, as, for instance, the right of trial by the regular jury, and not then unless the complaining party had a meritorious cause of action or defense.

Appeal from the District Court of Eastland County. Tried below before Hon. J. J. Butts, Special Judge.

D. G. Hunt, for appellants.

B. W. Patterson, for appellees.

STEPHENS, ASSOCIATE JUSTICE.—Appellees declared on three promissory notes secured by vendor's lien on a tract of land in Eastland County. Partial failure of consideration—the vendor never having had any title to a part of the land—was the only defense. Appellees acquired the notes in due course of trade before maturity for a valuable consideration without notice of any want of consideration. Judgment was consequently rendered in their favor for the full amount sued for, with foreclosure of the lien.

The first assignment raises a question of some difficulty, as follows: "The case was called for trial in the courthouse of Eastland County, Texas, and in the County Court room thereof by a special judge at which place and while the regular judge was holding court. The counsel for Bates and Bedford appeared before said special judge in this case and objected to said special judge proceeding to try this case while the District Court of Eastland County, Texas, was then open and conducting its business by the regular elected, acting and qualified judge. This objection was overruled, which action of the court was error." The proposition submitted is, "Two District Courts in Eastland County, Texas, could not be in session at the same time and place unless authorized by law, and since only one of such courts was so authorized, the second one can only act with unanimous consent of all parties." An Oregon case is cited in support of the proposition. Baisley v. Baisley, 13 Pac. Rep., 888, which seems to sustain it, though the question was conceded in the opinion in that case to be a difficult one. Cox v. Gress, 51 Ark., 224, is to the same effect. Other cases are cited as being in line with these in Enc. Pl. & Pr., vol. 11, p. 795, but only those from Kansas and North Carolina as accessible to us, which evidently announce correct conclusions, particularly those from Kansas, on the facts there stated. They also announce the general principle that since a judge *pro tem* is only a substitute and not a duplicate judge, it is not contemplated that both the regular and special judge should hold court at the same time in the

same county or district. On the other hand, it is held by the Court of Appeals of Kentucky in Paducah Land, etc., Co. v. Cochran, 37 S. W. Rep., 67, that a correct judgment rendered by a special judge should not be set aside because it was rendered at a time when the regular judge was holding court. To the same effect is Courtney v. State (Ind.), 32 N. E. Rep., 335. Counsel for appellants states that he has been unable to find any Texas case directly in point; but it is difficult for us to see why the case of Niagara Insurance Co. v. Lee, 73 Texas, 641, is not in point, at least so far as the case at bar is concerned. True, it was stated in the opinion that the court was not called upon by the assignment then under consideration to "express any opinion as to whether it was lawful for two District Courts to be in session in Mitchell County at the same time for all purposes," but a judgment was upheld granting a new trial which had been rendered by the regular district judge holding court in the county court room of Mitchell County while a special judge appointed by the Governor was holding the District Court of that county in the District Court room.

We have finally reached the conclusion that inasmuch as appellants had no defense whatever to the suit, and therefore could not have been prejudiced by the action of the special judge complained of, they are not entitled to have the judgment reversed merely because it was rendered at a time when the regular judge was holding court. It is not denied that the special judge was clothed with authority to hear and determine this case when the judgment complained of was rendered but for the fact that the regular judge was then holding court in Eastland County. That fact, however, did not deprive the special judge of the power conferred on him to try this case, but at best could only have interfered with the proper exercise of that power and did not, therefore, render the judgment void. If apellants had been deprived of any valuable right by the irregular manner in which the special judge exercised the power conferred on him, they would doubtless have been entitled to a reversal of the judgment. For instance, if they had been denied the right of trial by the regular jury, as they were and of which complaint is also made, that would have been ground for reversal if there had been any issue to be submitted to a jury. But as there was none the denial of this right was of no consequence, as has been expressly decided. (Caldwell County v. Harbert, 68 Texas, 327.)

The questions raised by other assignments are included in the disposition above made of the first and the judgment is affirmed.

Affirmed.

FORT WORTH AND RIO GRANDE RAILWAY COMPANY v. F. M. HUDGENS.

Decided May 12, 1906.

1.—Railways—Killing Stock—Stock Law.

A railway company is not liable, in the absence of gross negligence, for the value of stock killed or injured by its locomotives in a precinct where the stock law is in force, nor does the burden rest upon the employes of the company to keep a lookout for stock in such cases.

2.—Charge—Contributory Negligence.

Where the facts alleged as constituting contributory negligence are undisputed it was misleading for the court to charge that the burden of proof was upon the defendant to establish its plea of contributory negligence.

3.—Charge—No Issue.

Where there was no evidence that the road was fenced, nor that the place of killing was at a crossing, nor within switch limits, it was error for the court to charge the jury that when the killing occurred at a place not a street or road crossing or switch limits or where the right of way was not fenced, then proof of the accident is negligence per se.

Appeal from the County Court of Erath County. Tried below before Hon. M. J. Thompson.

Martin & George, for appellant.

Nugent & Carter, for appellee.

CONNER, CHIEF JUSTICE.—This case was tried in the County Court of Erath County on appeal from a Justice's Court and resulted in a judgment for appellee, for the sum of $140. It was alleged as grounds of recovery that the engine and cars of the appellant company killed two of appellee's horses. Appellant pleaded the general denial and specially that if appellee's animals were killed as alleged, it was within commissioner's precinct number 1 of Erath County, where the stock law was in force prohibiting animals from running at large, and that appellee was guilty of contributory negligence in permitting his said animals to remain loose and range upon the railway track.

In the fifth paragraph of the charge, the jury were instructed that each and every railway company is liable to the owner, for the value of all stock killed or injured by its locomotives and cars, and in the ninth paragraph they were instructed that it was the duty of appellant to keep a lookout and to use diligence to prevent injuring or killing such stock as should pass upon the railroad, and that a failure to do so would be negligence as defined in the charge. In so charging we think the court committed error under the facts of this case. Appellee testified that he voluntarily turned his horses loose the night before. It was also undisputed, and the court so charged the jury, that the killing occurred within a commissioner's precinct where the stock law was in force and where it was forbidden that stock should be permitted to run at large. It is now well established that in such cases railway companies in the absence of negligence are not liable for the value of stock killed, nor in such cases does the burden rest upon the employes of the railway company to keep a lookout for stock. Say our Supreme Court in the case of Railway Company v. Cocke, 64 Texas, 157: "If there be a valid ordinance of a city, or a statute, in force at the time and place where the injury occurs, by which the running at large of animals is made unlawful, then the entry of the animals upon a railway track or other uninclosed land is a trespass. In such case, a railway company will not be responsible to owners for injury done by its cars to animals entering upon its track, unless the conduct of its employes amounts to gross negligence as heretofore defined; for under such circumstances railway

companies are entitled to presume that all persons will comply with the law which forbids the owner to permit his animals to run at large; hence, are excused from the exercise of that care which will not be necessary if the owner complies with the law—are excused from the exercise of such care as they would exercise were it lawful for animals to be at large and therefore expected to be so," and, further, if stock unlawfully "enter upon a railway track, it is enough that the employes of the company use such care, after the danger becomes known, as a prudent man would, under the same circumstances, to avoid injury." See also Houston & T. C. R. R. Co. v. Jones, 40 S. W. Rep., 745; International & G. N. Ry. v. Dunham, 68 Texas, 232; Houston & T. C. Ry. Co v. Atlas Press Brick Works, 10 Texas Ct. Rep., 677; Missouri, K. & T. Ry. Co. of Texas v. Tolbert, 90 S. W. Rep., 508. It is well settled by these authorities that under the circumstances of this case no duty or diligence on the part of the operatives of the train in question to avoid injuring appellee's horses arose until after their discovery upon the track and until after a reasonably prudent man in the exercise of ordinary care would have seen that they would not get off of the track. The proof without dispute shows that the horses in question were killed very early in the morning. There seems to be some controversy in the testimony as to whether it was then sufficiently light to plainly discern objects at any considerable distance, although appellee's witnesses testify to the effect that it was. The track approaching the point where the animals were killed was straight for about one-half mile; the tracks of the horses show that they got upon the road about one hundred yards before being struck and that no warning signal was given. The fireman testified that he was putting coal in the engine until his attention was attracted by the engineer applying the brakes, at which time he looked up and within about twenty feet of the front of the engine saw the animal first struck. The engineer testified that he was running some twenty-five or thirty miles per hour on schedule time; that it was about five o'clock in the morning; that when he first discovered the animals they were running as if to cross to the other side of the track, and but a short distance in front of them, a distance so short as to render it impossible for him to stop in time to avoid the injury; that he did not sound a warning because he did not have time to do so. The evidence of these witnesses plainly raised the inference that they at least exercised ordinary care after having discovered the horses upon the track.

The facts stated seem also to render objectionable the second paragraph of the court's charge wherein the jury were instructed that the burden of proof was upon the defendant to establish its plea of contributory negligence. The plea consisted alone of allegations setting up the existence of the stock law and of appellee permitting his horses to run at large. These facts were, as stated, undisputed and the instruction noted inapplicable.

The error above noted in giving in charge the stock statute (Rev. Stats., 4528) making railway companies liable to the owner irrespective of negligence for the value of stock killed, and emphasized by a special instruction given by the court in answer to a question of the jury after their retirement, namely: "Do the laws of Texas require the right of way to be fenced at the place of accident? (Signed) T. C. Robertson,

Foreman." To which the court answered by giving the following written instruction: "Gentlemen of the Jury, in answer to the question submitted to the court through your foreman, I give you as part of the law in this case the following; the statute does not require the railroad company to fence its right of way. If, however, an accident occurs on the railroad where the right of way was fenced by the railroad company, the burden is then on the plaintiff to show gross negligence. Where an accident occurs, if the same is not at a street crossing, public road crossing or within the switch limits of any depot yards, and the right of way is not fenced then proof of the accident is negligence *per se,* or within itself." It is not suggested in the evidence that the road was fenced or that the place of killing was at a crossing or within the yard or switch limits, and the concluding part of the charge made proof of the accident alone sufficient proof of negligence.

As a counter proposition to all of appellant's assignments, appellee contends in effect that inasmuch as gross negligence was alleged, charged, submitted, and found by the jury, that "errors in the court's charge on immaterial matters which could have no controlling effect in the case are harmless, and the judgment should be affirmed." We think it, however, apparent that the contention fails to answer the objections pointed out.

The judgment is accordingly reversed and the cause remanded for the errors noted.

Reversed and remanded.

R. P. SMITH v. PECOS VALLEY AND NORTHEASTERN RAILWAY COMPANY ET AL.

Decided May 12, 1906.

1.—Appeal—Absence of Statement of Facts.

In the absence of a statement of facts in cases where the judgment is authorized by the pleadings, the ruling of the court upon special exceptions, in giving and refusing charges and in receiving or excluding evidence will not be reviewed.

2.—Same—Diligence.

The failure or refusal of an official stenographer to prepare and file upon request of either party a transcript of the testimony on the trial, would be cause for reversal upon a proper showing; but before such sequence would follow it must be made to appear that the complainant was not himself guilty of negligence in failing to compel the clerk by mandamus to perform his duty, or failing in this, to have secured and filed a statement of facts in the usual form.

Appeal from the District Court of Deaf Smith County. Tried below before Hon. Ira Webster.

L. C. Barrett and *John P. Stayton,* for appellant.

J. W. Terry and *Madden & Trulove,* for appellees.

CONNER, CHIEF JUSTICE.—Appellant instituted this suit in the District Court of Deaf Smith County, Texas, on the 20th day of March,

1905, against the Pecos Valley and Northeastern Railway Company, incorporated under the laws of the Territory of New Mexico, and the Pecos and Northern Railway Company, a Texas corporation, to recover damages for personal injuries alleged to have been negligently inflicted upon him by the servants and employes of the first named company on January 17, 1905, in Portales, New Mexico.

Appellant alleged that he was a citizen of New Mexico, and appellees among other things pleaded in bar the general denial and specially a law of the Territory mentioned inhibiting suits of the class under consideration beyond its territorial limits. The court overruled special exceptions to this answer and the principal assignments of error combat these rulings, the contention most urgently pressed upon us being that such law can have no extra territorial force. The law as pleaded herein and a discussion of one of its sections not involved in this suit, may be found in the case of Buttron v. El Paso & N. E. Ry. Co., 15 Texas Ct. Rep., 339, but we find that we can not consider the assignments relating to this subject.

There is included in the transcript what purports to be a statement of facts, but it was filed nearly three months after the time it should have been filed and hence we can not consider it. By supplemental transcript there is also shown what purports to be an "agreed statement of facts." But this, too, we must decline to consider because it is without the approval of the trial judge. (Graves v. George, 54 S. W. Rep., 262.) It is now well settled that in the absence of a statement of facts and in cases where the judgment is authorized by the pleadings, the action of the court in its ruling upon special exceptions, in giving or refusing charges, and in receiving or excluding evidence, will not be reviewed. These conclusions dispose of all assignments save the last, which is as follows: "The official stenographer and lower court erred in the lower court in not filing his said stenographer's report of the evidence taken by said stenographer in short hand in the court below on request of appellant."

The record shows that the judgment below was rendered on the 25th day of August, 1905; that on August 28 the motion for new trial was presented and overruled, and an order of the court entered allowing the parties to file a statement of facts within twenty days after adjournment of the term, which occurred on September 2, 1905. The appeal was perfected on September 21 by filing an approved appeal bond. It further appears from affidavits of appellant's attorney and others, filed before us that in the District Court on the trial one John R. Bell was the official stenographer; that he made stenographic notes of the evidence and proceedings in this case; that upon the day of the trial and many times thereafter appellant's attorney requested said stenographer to make out and furnish a transcript of all such evidence and proceedings, offering to pay the legal fees therefor; that such stenographer abandoned the district and wholly failed to do as requested. We quote the following from the affidavit of appellant's attorney: "That on the same day after said cause was tried, and after the rendition of said judgment, I requested, as counsel for appellant, John Bell, who was then and there the official stenographer who took down the evidence in short hand on said trial, that he would make out and file in the court below his report typewritten, and told him his fees were ready. And he then and there

promised to comply with said request. That afterwards on or about the 28th or 29th days of August, 1905, I made said request again, and he again made the same promise that he would file the same. That again on or about the 5th, 7th, 9th, 14th, 16th, 22d, 29th and 30th days of September, 1905, I made the same request and urged the said John Bell, stenographer as aforesaid, to make out and file said report, offering to pay him his fees for same, which he refused, but promised me that he would make out said report at once and file same, that he had it almost completed on last said date; that on or about the 5th day of November, the last time I saw or have seen said Bell I asked and urged him to make out said report and he said that he would do so at once as he had it completed and would give it to the Hon. Ira Webster, the district judge who presided at the time of said trial; that I believed and relied upon the promises of the said Bell to make out and file said report, but he failed to do so, and failed to make the same out or to typewrite the same, or to give the same to said presiding judge; that about the 15th day of November, 1905, I learned that said Bell had left the State and would not return, and that he was then in Old Mexico."

We regard this showing as altogether insufficient to require of us a reversal of the judgment. The Act of the Twenty-ninth Legislature (see Laws 1905, 219) confers upon litigants the right to receive what was sought in this case, and upon a proper showing a judgment would doubtless be reversed where the losing party has been denied such right. But before any such consequence should be visited upon the successful party, we think it should at least be made to appear that the complainant exercised reasonable diligence to avail himself of the privilege given by the Act. The act of the stenographer in making a transcript of his notes is evidently ministerial, and appellant makes no effort to show why he did not by mandamus or other proper proceeding in the court below undertake to compel compliance with his request. The Act, when considered with other laws relating to the subject, contemplates that the stenographer's transcript shall be made out and filed within the time allowed for filing statements of fact, and the failure of the stenographer in question as shown by the affidavits, in legal effect, amounted to a refusal to perform a plain ministerial duty within the proper time, and appellant should have sought enforced performance by seasonable application to the court, or failing in this, have secured and caused to be filed a statement of facts in the usual form, which, so far as we can see from the record, would have been allsufficient in the present case.

It is ordered that all assignments be overruled and the judgment affirmed.

Affirmed.

Writ of error refused.

BRUCE ROBERTS v. R. J. BROWN ET AL.

Decided May 12, 1906.

1.—False Imprisonment—Authority of Officer.

Under the provisions of section 1014 of United States Compiled Statutes of 1901, a justice of the peace of Clay County, Texas, upon complaint filed with him charging the offense of assault with intent to murder in the Indian

Territory, was empowered to issue a warrant for the arrest of the plaintiff, and the defendant, the sheriff of Clay County, was authorized and it was his duty to arrest the plaintiff, charged with said offense, and to take him before one of the officers named in said statute for hearing.

2.—Bail—Section 1015, U. S. Compiled Stats., 1901, Construed.

Under the provisions of section 1015, United States Compiled Statutes of 1901, only the judicial officer having jurisdiction to hear the complaint, and not the officer making the arrest, has authority to grant bail.

3.—Mistaken Authority—Immaterial.

The fact that the justice of the peace was mistaken in supposing that he was authorized by the State statutes to issue the warrant for the arrest of the plaintiff was immaterial since he was fully authorized by the United States statutes to do so.

4.—Defective Complaint—Immaterial.

The failure of the officer issuing the warrant of arrest to insert in the complaint the date of the commission of the offense would not render the sheriff who signed it liable for false imprisonment.

5.—False Imprisonment—Damages—Charge.

The plaintiff necessarily suffered injury and was entitled at least to nominal damages where the sheriff placed him in jail for forty hours instead of taking him at once before the nearest judicial officer for bail, and it was error for the court to submit the question of injury vel non to the jury.

6.—Same—Liability of Sureties.

If the sheriff was guilty of false imprisonment his bondsmen were liable.

Appeal from the District Court of Clay County. Tried below before Hon. A. H. Carrigan.

W. T. Allen, for appellant.

Wolfe, Hare & Maxey and *P. M. Stine,* for appellee.

SPEER, ASSOCIATE JUSTICE.—Bruce Roberts sued R. J. Brown, sheriff of Clay County, and his bondsmen to recover damages for false imprisonment, alleging that said Brown made a complaint before a justice of the peace of precinct number 1 in Clay County, charging him with the offense of assault with intent to murder in the Indian Territory on the —— day of ——, 190—; that the justice of the peace issued a warrant for plaintiff's arrest upon which plaintiff was arrested by the defendant Brown and placed in the county jail, where he was kept confined for a period of about forty hours with no opportunity to make bond. The trial court sustained a demurrer as to the liability of the sureties and the cause as to the sheriff was tried before a jury, resulting in a verdict against the plaintiff, from which he has appealed.

Appellant insists, first, that the complaint upon which the warrant for his arrest was based was absolutely void and his arrest and imprisonment therefore illegal, entitling him to a summary instruction at the hands of the court. But with this contention we can not agree. Section 1014, United States Compiled Statutes, 1901, reads: "For any crime or offense against the United States, the offender may, by any justice or judge of the United States or by any commissioner of a circuit to

take bail, or by any chancellor, judge of a Supreme or Superior Court, chief or first judge of Common Pleas, mayor of a city, justice of the peace, or other magistrate of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. . . . That it shall be the duty of the marshal, his deputy or other officer, who may arrest a person charged with any crime or offence, to take the defendant before the nearest Circuit Court Commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before him. . . ." Section 1015 authorizes bail in such cases as follows: "Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding section to arrest and imprison offenders."

Under these statutes the justice of the peace of precinct number 1 in Clay County was empowered, upon the complaint of appellee Brown, to issue a warrant for the arrest of appellant agreeably to the usual mode of process in this State, and appellee Brown was authorized, and it was his duty, upon receiving such warrant to arrest appellant and to take him before the nearest Circuit Court Commissioner or the nearest judicial officer having jurisdiction for a hearing, commitment, or taking bail for trial. It is insisted that appellant had the right to demand bail of appellee Brown, and the evidence indicates that that officer was requested to allow appellant to make bond. Section 1015 above quoted is relied upon, in part at least, for this insistence. But we think the proper interpretation of that section is that bail may be allowed by the Circuit Court Commissioner or other judicial officer having jurisdiction to hear the complaint. True, the section declares that in such cases bail may be taken by any of the persons authorized by the preceding section to arrest and imprison offenders, but an examination of the wording of the preceding section shows that it is only the judicial officers named who are authorized to arrest, imprison or bail as the case may be, the accused.

Appellant insists that the provisions of our code of criminal procedure for the apprehension and arrest of fugitives from justice from other States or Territories have no application to this case, where the offense is charged to have been committed in the Indian Territory. We agree with this contention, but if the justice of the peace proceeded under the mistaken belief that such statutes authorized his procedure, his acts nevertheless were valid, since they find ample authority in the section of the United States Compiled Statutes above quoted.

We think the failure of the justice to give the date of the commission of the alleged offense in the complaint would not make void that instrument so as to authorize a civil proceeding for damages against the appellee who signed it.

The judgment must be reversed and the cause remanded, however, for the error of the court in giving the following charge: "The burden of proof in this case is upon the plaintiff to show by the preponderance of evidence that he has suffered injury and sustained damages, as complained of by him in his petition, and if he has failed to do so you will find for the defendant." If appellee, instead of carrying appellant before the nearest judicial officer for bail, placed him in jail and confined him there for the length of time alleged, appellant upon showing these facts might be entitled to a verdict at least for nominal damages, since necessarily he has suffered injury. It is improper in such a case to submit to the jury as doubtful a fact as to which there can be no doubt.

It was also error to sustain the demurrer of the sureties upon the sheriff's bond. If the sheriff was derelict in the matter above discussed, the same was an official act for which his bondsmen would be liable in damages.

For these errors the judgment is reversed and the cause remanded for another trial.

Reversed and remanded.

GEORGE RAYMOND ET AL v. I. P. KIBBE ET AL.

Decided May 15, 1906.

1.—Amendatory Act—Title—Constitutionality.

When an article of the statute to be amended is sufficiently identified by reference thereto in the title of the amendatory act, and the article amended itself sufficiently indicates the purpose of the amendment, the title of the amendatory act is sufficient. The object of the constitutional requirement that the subject of an act should be stated in its title is simply to direct attention to the subject to be legislated upon, and such subject is sufficiently indicated when the title gives the number of an article in the code in which it is included, or identifies an article which forms a part of the acts of a particular legislature.

2.—Fish and Oyster Law—Act 29th Legislature.

Chapter 90, of the Acts of the Twenty-ninth Legislature, concerning the taking of fish and oysters in Texas waters, considered, and held not subject to the objection that it embraces more than one subject, neither of which is expressed in the title.

3.—Fish, Oysters, Etc.—Title Thereto—Tax.

The title to fish, oysters, terrapin, shrimp, etc., in the public waters of the State is, and always has been, vested in the State, and the State may therefore impose such conditions and burdens as it sees fit upon the appropriation of said property to private uses.

4.—Same—Taking Shrimp—Not Class Legislation.

The taking of shrimp is treated by the Legislature as a distinct occupation; it therefore had a right to prescribe a distinct set of rules governing that occupation, and since the occupation is open to all men alike, upon compliance with the law, that feature of the Act in question is not subject to the objection that it is class legislation.

Appeal from the District Court of Calhoun County. Tried below before Hon. James C. Wilson.

Dupree & Pool and *Willett Wilson,* for appellant.—Chapter 190 Acts of the Twenty-ninth Legislature, approved April 14, 1905, entitled Fish and Oyster Commissioner, and the several sections thereof, are unconstitutional. Section 35, art. 3, of the Const. 1876; Adams v. San Angelo Water Works Co., 86 Texas, 485.

Section 56, article 3, of the Constitution, giving the right to the Legislature to pass special laws for the preservation of fish, confines the Legislature to that one object, and any law attempted to be passed by the Legislature on the question of fish other than the one for the preservation of the fish, conflicts with said constitutional provision. Sec. 56, art. 3, Const. of 1876; Gustafson v. State, 48 S. W. Rep., 519; 8 Cyc., 1122; Morris v. Cummings, 45 S. W. Rep., 383.

Section 1, article 8, of the Constitution, provides only for the levy and collection of an advalorem or property tax, a poll tax, an occupation tax and an income tax, and any other character of tax attempted to be imposed, is an unconstitutional tax and will not be upheld by our courts. Sec. 1, art. 8, Const. of Texas; Taylor v. Boyd, 63 Texas, 541; Higgins v. Bordages, 88 Texas, 467; Norris v. City of Waco, 57 Texas, 635; 8 Cyc., pp. 1108 and 1110; State ex rel. Armour Pk. Co. v. Stephens, 48 S. W. Rep., 929; 25 A. & E. of Law (1st ed.), pp. 65, 66 and 67; 19 Cyc., p. 988, sec. B, and authorities there cited; State v. Switzler, 45 S. W. Rep., 245; McCready v. Commonwealth of Virginia, 94 U. S., 391.

It is beyond the authority of the Legislature to attempt to clothe the Fish and Oyster Commission of the State with power to levy and collect an advalorem tax, he not being a constitutional officer, nor the officer authorized under the Constitution to levy and collect such tax. Sec. 18, art. 8., Const. of Texas; Sec. 16, art. 8, Const. of Texas; Sec. 14, art. 8, Const. of Texas; Clegg v. State, 42 Texas, 605; George v. Dean, 47 Texas, 86; Cornell v. State, 55 S. W. Rep., 980; Rev. Stats., arts. 5121, 5212a; State v. Switzler, 45 S. W. Rep., 245.

Fish and oysters are personal property, and when in the possession of an individual, can not be taken or confiscated without due process of law. Sec. 56, art. 3, Const.; Sec. 9, art. 1, Const.; Sec. 15, art. 1, Const; Sec. 17, art. 1, Const.; Sec. 19, art. 1, Const.; Art. 2514, chap. 90, Acts 29th Leg.; McCready v. Commonwealth of Virginia, 94 U. S., 391; Gustafson v. State, 48 S. W. Rep., 519; Grigsby v. Peak, 57 Texas, 148; Lynn v. State, 25 S. W. Rep., 779; McFadden v. Longham, 58 Texas, 586; 25 Texas Sup., 293; Paris v. Hale, 13 Texas Civ. App., 389; 8 Cyc., 1126, secs. 1-3, line 21, p. 1122; Armstrong v. Traylor, 87 Texas, 601; Beavers v. Goodwin, 14 Texas Ct. Rep., 429; 19 Cyc., 988, sec. B, and authorities there cited.

Where an individual's property is subject to the payment of a tax, and made liable for said tax, and he is denied the right to contest the payment of said tax in the courts or is denied the right to redeem said property by the payment of said tax and legal charges thereon, or where the surplus of said property, after the payment of said tax, is denied him, or where an officer is clothed with plenary powers to summarily confiscate property upon which a tax may be due, with no equity of redemption in the owner of such property, such character of taxation is unconstitutional. Art. 8, sec. 15, Const.; Paris v. Hale, 13 Texas Civ.

App., 389; Morgan v. Oliver, 82 S. W. Rep., 1029; 8 Cyc., pp. 1106, 1097, 1080 to 1084, 1124 to 1127, 1130 to 1132.

R. V. Davidson, Attorney General, and *Jewel P. Lightfoot,* Assistant Attorney General, for appellees.

GILL, CHIEF JUSTICE.—George Raymond, Tony Apostollo and the Port Lavaca Fish and Oyster Company, a corporation, brought this suit to recover damages from I. P. Kibbe, the Fish and Oyster Commissioner of Texas, and J. E. Garner, his deputy at Port Lavaca, Texas, and for injunction perpetually restraining the Commissioner and his deputy from collecting or attempting to collect the special tax imposed under article 2514, chapter 90, of the Acts of the Twenty-ninth Legislature.

Raymond and Apostollo alleged that they were each the owners of boats duly registered in the custom house at Port Lavaca and with said boats were engaged in the taking from the coast waters of Texas fish and oysters for sale on the market. That the Port Lavaca Fish and Oyster Company bought from them all the fish and oysters so caught and taken by them, paying the market price therefor. That fishing was their main business from which they obtained a livelihood and support. That they had paid the license fee required of them under article 2418K of the Act cited above and had, pursuant to the requirements of the Act, registered their boats in the office of appellee and had obtained from appellees their official permit to engage in the business of taking oysters and fish.

It was further averred that the Commissioner and his deputy were collecting and attempting to collect the tax imposed by article 2514 of the Act on fish and oysters taken by them, whereby they had been damaged. The suit both for damages and injunction was predicated on the alleged unconstitutionality of the Act of the Twenty-ninth Legislature of which the two cited articles are a part, it being conceded that the course pursued by defendants was within the requirements of the law as passed. The specific objections to the law were pleaded in detail.

The district judge in chambers granted a temporary injunction, but on final hearing exceptions were sustained to the petition which amounted to a holding that the law was valid, and the plaintiffs refusing to amend a judgment of dismissal was entered. From that judgment plaintiffs have appealed and have presented in their brief sixty-three assignments of error. It is obviously unnecessary to take up these assignments in detail. If the court erred, his error consisted in sustaining the law as valid, hence the answer to the broad inquiry arising upon that ruling will effectively dispose of this appeal.

The parts of the law assailed are referred to in the petition as articles 2514 and 2518K, chapter 90, Acts of the Twenty-ninth Legislature. The title of the Act of which the two cited articles form a part is as follows:

"An act to amend articles 2513, 2515, 2518d, 2518e, of chapter 4, title 48 of the Revised Civil Statutes of 1895; articles 2516 and 2518h of chapter 175 of the General Laws of 1899, passed by the Twenty-sixth Legislature, articles 2514, 2518c and 2518k, chapter 122, of the General

Laws of 1903, passed by the Twenty-eighth Legislature, and article 529g, chapter 130, of the General Laws of 1901, passed by the Twenty-seventh Legislature, and adding 529x and repealing all laws in conflict therewith relating to the Fish and Oyster Commissioner of the State of Texas, his duties, etc., and declaring an emergency."

Section 1 of the Act provides that the articles named "Shall be so amended as to hereafter read as follows:"

Article 2513 is then set out, which declares in substance, among other things, that all the public rivers, bayous, lagoons, lakes, bays and inlets in this State and all that part of the Gulf of Mexico within the jurisdiction of the State, together with their beds and bottoms and all the products thereof, shall be and remain the property of the State, except insofar as their use shall be permitted by the laws of this State. The fish and oyster industry is placed under the control of the Fish and Oyster Commissioner of the State. He is clothed with the power of a sheriff, and enjoined to execute the laws relating to the matters under his control.

Article 2514 reads as follows:

"For the purpose of protecting the fish and improving the natural oyster reefs and protecting both the natural reefs and private oyster beds and to carry out the fish and oyster laws of the State of Texas and as one of the conditions on which the State consents to the taking or removing of fish from her waters, or to the fishing or removal of oysters from her natural reefs, or the use or rental of her water bottoms for oyster propagating purposes, there shall be and is hereby levied a special tax of one-tenth of one cent per pound on all fish, turtle, terrapin and shrimp taken for market from the public coast waters within the jurisdiction of this State and a tax of two (2) cents per barrel on each and every barrel of oysters gathered from the said waters of this State, whether from the natural reefs or private oyster beds, for sale or shipment; provided, that oysters taken from any waters for bedding purposes shall not be subject to this tax until again taken up for sale or shipment. This special tax shall be paid to the Fish and Oyster Commissioner or his deputy, by the person bringing said fish, turtle, terrapin, shrimp or oysters to market, whether he be the person who fished said products or his agent, before he shall be allowed to sell same or consign same to any other party for sale, shipment or storage. When this special tax has been paid it shall be the duty of the Fish and Oyster Commissioner or his deputy receiving the tax to give a receipt for same, together with a permit authorizing holder thereof to dispose of the products on which the special tax has been paid. A duplicate of which receipt and permit shall be retained in the office of said Commissioner issuing same. This permit shall be given by the person delivering said products, to the person, firm or corporation to whom the products mentioned therein shall be sold or delivered for sale, shipment or storage. Any fish, turtle, terrapin, or oysters found in the possession of any packer, buyer or commission man for which he can not show the State permit for the disposition of these products so found shall continue the property of the State and may be seized by the Fish and Oyster Commissioner or any of his deputies and sold, the proceeds thereof to go to the fish and oyster fund of the State.

"It shall be the duty of the Fish and Oyster Commissioner and his deputies to enforce the payment of the special tax herein provided for and as far as practicable to inspect all the products so taxed and to verify the weights and measures thereof; and the Fish and Oyster Commissioner is hereby authorized to formulate such rules and regulations as he may deem most expedient to accomplish the duties above set forth; provided, such rules and regulations shall conform to the Constitution and laws of the State of Texas."

Article 2518k need not be set out in full. It is very lengthy. It provides in substance for the issuance of licenses to the masters or captains of boats designed for taking fish or oysters for market. It provides, among other things, that the applicant for the license shall in addition to the payment of the license fee agree and bind himself to pay the tax imposed in article 2514. The entire act is declaredly designed to protect the fish, oyster, turtle and shrimp in the coast waters of the State, to regulate their taking, to forbid their taking for market except upon certain prescribed conditions, and to place the enforcement of the law under the control of the Fish and Oyster Commissioner.

Appellants contend that the provisions they assail are void because not included in the title of the Act. Under this objection they maintain that the title of an amendment is insufficient if it merely refers to the title of the amended law or to the number of the articles amended. In view of the provision of the Constitution governing the title of legislative acts the proposition has much inherent force and could be sustained upon principles apparently sound. But our Supreme Court, following recognized authority, has established a rule which includes the question before us and requires a holding that if the articles amended are sufficiently identified by references in the title, and the articles amended themselves sufficiently indicate the purposes of the amendment, the title of the amendment is sufficient.

Justice Williams, speaking for our Supreme Court in Mortgage Company v. Hardy, 93 Texas, 299, uses the following language: "The question therefore arises whether or not the title to the Act of 1897, in giving the number of the article to be amended, sufficiently indicated the subject treated in the unconstitutional proviso as a part of the subject of the amendatory act. We can see no substantial reason why this question should not be answered in the affirmative. The object of the requirement that the subject of an act should be stated in its title is simply to direct attention to the subject to be legislated upon. Such subject is sufficiently indicated when the title gives the number of an article of the code in which it is included; and the fact that a provision in such article may be unconstitutional does not lessen the effect of the reference to it as notice that it is to be made the subject of further legislation. The amendatory act derives no force as law from any virtue in the Act amended, but takes effect from the new exercise of legislative power. If such power is extended and the legislative will expressed in accordance with the Constitution such expression becomes law without the aid of the statute referred to in the title whether the latter is constitutional or not. The statute amended is referred to only to indicate the subject with which the Legislature proposes to deal and to such purpose its validity is not essential. The very object of the

amendment may be to supply a constitutional enactment in the place of one which was unconstitutional."

We think there can be no difference in principle between such a reference to an article which has been embodied in the code and one which forms a part of the Acts of a particular Legislature. If the reference is certain and unmistakable the principle applies. It is unnecessary to cite further authority. The opinion in the case cited is an able review of the question and as authority is conclusive. In applying the rule to the law in question we need trace the history of this legislation no further back than the amendatory act of 1903 of which the act in question is itself amendatory. In the act of 1903 (General Laws, p. 189), article 2514 imposes the same tax as imposed by the last act and otherwise prescribes the duties of Fish and Oyster Commissioner in addition to prescribing rules and regulations for the governance of those taking and marketing fish, etc. The assignment assailing the Act as unconstitutional on account of defects in the title are overruled.

We overrule without discussion those assignments which assail the Act as unconstitutional on the ground that it has more than one subject. We think it clear that the general purpose is to regulate the taking of fish, oysters, etc., from the coast waters, and that the provisions objected to are germane to the general subject. It is not required that the title should serve as an index to the various provisions of the Act. (26 Am. and Eng. Ency. of Law, p. 581; Skinner v. Garnett, 96 Fed. Rep., 735.)

The objection is made that the Act attempts to vest in the State the title of the fish, oyster, terrapin, and shrimp in the public waters, and that this object is not embraced in the title. If this objection was sound the fact would remain that the title is so vested in the State and has ever been. The provision is declaratory and immaterial to the validity of the law. But the fact that the subjects of the legislation are the property of the State is not only important but controlling in the disposition of other questions presented in appellant's brief. We will consider them therefore in this connection. The points are made,

First. That the State exhausted its police power over the matters treated in the Act when it provided for license for boats and the cost thereof and supervision by the Commissioner and his deputies. That therefore the tax levied upon the fish and oysters caught by the holders of the license is a property tax which comes under the head neither of an occupation tax nor an excise tax and because it is not levied in the form of an *ad valorem* tax it is void because not equal and uniform.

Second. The Act is a revenue measure and is void because it originated in the Senate, whereas the Constitution requires such measures to originate in the House.

Third. The feature of the law empowering the Commissioner to confiscate fish sold and held without the requisite permit is void, (a) because the articles when reduced to possession are private property, and (b) because takers of shrimp are not included in the forfeiture clause and the provision is therefore class legislation.

Fourth. The Act permits the Commissioner to exercise the power of seizure and sale summarily, thus depriving the individual of his property without due process of law.

If the proposition is sound that the State as the representative of

its citizens is the owner of the fish, oysters, turtle, terrapin and shrimp in its public waters, then the obvious answer to each and all of the last four objections to the law is that the State may impose such conditions, restrictions and burdens as it chooses upon the taking and appropriation of its own property to private ownership and uses. That the basic proposition is sound is established beyond question. (13 Ency. of Law, p. 556; McCready v. Virginia, 94 U. S., 391; Magner v. People, 97 Ill., 334; Dize v. Lloyd, 36 Fed. Rep., 651; Geer v. Connecticut, 161 U. S., 533; American Ex. Co. v. The People, 133 Ill, —.) Similar legislation has been upheld in many jurisdictions. Authorities, *supra.*

Appellants' contention that as the Constitution conferred upon the Legislature the right to pass laws for the preservation of fish and game, the authority to declare the title and ownership to be in the State was thereby excluded. Appellants lose sight of the fact that the provision referred to does not affect the question of ownership, but simply empowers the Legislature to pass such laws as will preserve that class of the public property. This ownership includes the power exercised in this instance. Indeed, it may be truly said that the effect of the legislation in question is to put a price upon such of its property as is taken for market purposes imposing as a condition precedent to the passing of the title the payment of the tax and the full performance of the requirements of the Act. It is not enough that the fisherman procures a license for himself and his boat. His title to the captured fish is still incomplete until he pays the price imposed and receives from the proper officer the evidence of his title. In the absence of this evidence of title, which must follow the fish into the hands of the dealer, they are still the property of the State, and the Commissioner in exercising the power of seizure is simply reclaiming the State's own. If the Commissioner, abusing his power, makes a wrongful seizure the courts are doubtless open to the person aggrieved, just as in the case of a wrongful levy by a tax collector who might summarily seize property not subject to the collection of the tax for the collection of which the levy was made.

It is immaterial that the law-makers denominate the impost a tax. The property belonged to the State, and irrespective of any other reason upon which the legislation might be upheld this ownership furnishes ample basis for the powers exercised. The State having the right to regulate, sell, give or withhold altogether in the protection of its fish and game, certainly had the right to impose the cost of regulation, surveillance and inspection upon those to whom the right to take is granted.

The last objection which we deem it necessary to notice is that shrimp are not made subject to seizure and sale by the Commissioner, hence the law wrongfully favors those engaged in the taking of shrimp. If the law is susceptible of the construction that shrimp wrongfully taken or sold are not subject to seizure, the fact remains that the taking of shrimp is treated in the law as a distinct occupation to which the Legislature had the right to apply a distinct set of rules, and since every man alike may engage in the business of taking them, upon compliance with the law, that feature of the Act is not open to the objection that it is class legislation.

The validity of article 529x of the Act whereby a penalty is imposed.

and penal prosecution authorized for violations of the provisions of the Act is not up for decision upon this record.

We are of opinion the judgment should be affirmed and it is so ordered.

Affirmed.

Writ of error refused.

H. KEMPNER v. T. L. PATRICK ET AL.

Decided May 15, 1906.

1.—Several Documents—One Transaction.

A promissory note and a cotton contract were executed at the same time, by the same parties and as parts of one transaction. In a suit upon the note, the contract was properly admitted in evidence.

2.—Surety—Creditor—Impairment of Security.

If a creditor, without the consent of the surety, parts with or renders unavailable any security or fund which he has the right to apply to the satisfaction of the debt, the surety is discharged to the extent of the value or the impairment of the value of such security; this results from the surety's right of subrogation—to pay the debt and take the security.

3.—Same.

If the creditor, without the consent of the surety, voluntarily advanced to the debtor an additional amount of money upon the security in the possession of the creditor, thus impairing or destroying the security, the surety would be discharged pro tanto, if such advancement absorbed any part of the security.

4.—Same—Same.

This, however, would not be the result if the additional advancement was made by reason of the terms of the original contract, or because of a general custom known to the surety.

5.—Bill of Exception—Qualification.

At the foot of a bill of exception was the following statement signed by counsel for appellees, "Approved, except that we can not concur in the conclusion of what the answer of the witness will be." The bill was allowed by the judge without qualification. Held, the above statement was no part of the bill.

6.—Custom—General—Local.

Evidence of a general custom in a particular locality as to certain transactions is material and competent, provided it is shown that the parties to such transactions knew of the same. If the custom was not confined to any particular locality knowledge of the same might be presumed.

Appeal from the District Court of Galveston County. Tried below before Hon. Frank M. Spencer.

Kleberg, Davidson & Neethe, for appellant.—The cotton contract was not relevant to the question whether or not the note had been paid, and was therefore inadmissible. Willis v. McNeill, 57 Texas, 474; King Manfg. Co. v. Solomon, 25 S. W. Rep., 450.

The note being complete in itself and free from ambiguity, no evidence was admissible to show what the intention of the makers of such

note was as to how it should be paid, and no evidence to show a prior or contemporaneous verbal agreement to discharge the liability on said note in any way except as shown by its terms. Dolson v. DeGanahl, 70 Texas, 622; Bailey v. Rockwell Nat. Bank, 61 S. W. Rep., 530.

The court erred in permitting the defendant Patrick to testify that the sureties did not consent to his drawing $40 a bale for cotton forwarded to Kempner. Willis v. McNeill, 57 Texas, 465; Kellog v. McCabe, 92 Texas. 199.

The court erred in excluding evidence offered to show that without honoring the drafts of $40 per bale Kempner could not have gotten possession of the cotton. Houston, E. & W. T. Ry. Co. v. Adams, 63 Texas, 206; Grimes v. Hagood, 27 Texas, 693; Willis v. Thacher, 20 Texas Civ. App., 235.

The debtor has the right to apply payments at the first instance. Eylar v. Read, 60 Texas, 389. If he fails to do so the creditor has the right. Larkin v. Watt, 32 S. W. Rep., 554; Thatcher v. Tillory, 70 S. W. Rep., 782. In the absence of application by either the law will apply such payments. Phipps v. Willis Bros., 11 Texas Civ. App., 189; Reed v. Corry, 61 S. W. Rep., 157.

One who does business at a certain place is chargeable with the custom and usage under which such business is done at such place. Meaher v. Lufkin, 21 Texas, 393; Robinson v. United States, 13 Wallace, 363; Bibb v. Allen, 149 U. S., 481.

J. E. Starley and *Wheeler & Clough,* for appellees.—Parol evidence is admissible to show that two writings executed at the same time between the same parties were executed as parts of one and the same contract and as forming one entire agreement. Howards v. Davis, 6 Texas, 180; Dunlap v. Wright, 11 Texas, 601; Eppinger v. McGreal, 31 Texas, 147; Taylor v. Hudgins, 42 Texas, 246; Weir Plow Co. v. Evans, 24 S. W. Rep., 38; Stiles v. Giddens, 21 Texas, 784; Henry v. Sansom, 36 S. W. Rep., 123; Masterson v. Burnett, 3 Texas Civ. App., 488; Thomas v. Hammond, 47 Texas, 49; Gulf, C. & S. F. Ry. Co. v. Jones, 82 Texas, 165; City of Waco v. McNeill, 29 S. W. Rep., 1109.

Where third parties sign a contract as sureties and the original parties thereto make a new contract or increase the liability without the consent of the sureties, they are discharged from all liability thereon, and may show that such action was taken without their consent. Lane v. Scott, 57 Texas, 367; Ryan v. Morton, 65 Texas, 258; Clark v. Cummings, 84 Texas, 614; House v. American Surety Co., 21 Texas Civ. App., 592; Sanders v. Hambrich, 16 Texas Civ. App., 461; Kiam v. Cummings, 13 Texas Civ. App., 199; Durrell v. Farnell, 88 Texas, 110; Benson v. Phipps, 87 Texas, 580; Brown v. Fountain, 3 Texas Civ. App., 231.

The terms of a written contract can not be changed by rules of usage and custom. Gano v. Palo Pinto Co., 71 Texas, 102.

Usages and customs are facts which must be alleged in the same manner as any other material fact. Moore v. Kennedy, 81 Texas, 147; Anderson v. Rogge, 28 S. W. Rep., 106; Norwood v. Alamo Ins. Co., 13 Texas Civ. App., 479.

REESE, ASSOCIATE JUSTICE.—H. Kempner sued T. L. Patrick, W.

L. Fuller, J. A. Stewart and Don Bilberry to recover the amount alleged to be due upon a certain promissory note for $1,200, executed by defendants, with interest and attorneys' fees, and also to recover of T. L. Patrick $598.43 additional on open account. The trial resulted in a judgment for plaintiff against Patrick for the amount claimed of him, and in favor of defendants Fuller, Stewart and Bilberry, as to plaintiff's demand against them.

Defendants Fuller, Stewart and Bilberry answered that they had signed the note sued on as sureties for Patrick under the following circumstances:

On or about April 15, 1904, defendant Patrick being desirous of borrowing the sum of $1,250 arranged with Kempner for the loan of that sum as an advance on 100 bales of cotton to be shipped by Patrick to Kempner, who was a factor and commission merchant doing business in the city of Galveston. Patrick lived and was engaged in business at Barstow in Ward County, Texas.

In consideration of said arrangement the money was lent or advanced to Patrick, and Patrick, with the other defendants as joint and several makers as appears from the face of the note, but in fact as sureties for Patrick, which was known to Kempner, executed to Kempner a promissory note for $1,250 dated April 15, 1904, payable at Galveston, Texas, seven months after date thereof, with eight percent interest and ten percent attorney's fees. At the same time Patrick executed a certain contract called a cotton contract, which was also signed by the other defendants herein as guarantors, and which is as follows:

"In consideration of the preparation by and agreement of H. Kempner, to receive, and handle and sell on the terms hereinafter stated, all the cotton which I may consign to her, between this date and the first of January next, and of the advance by her to me of the sum of one thousand two hundred and fifty dollars, in view of such consignments, I, the undersigned, hereby agree to consign to said H. Kempner, at Galveston, Texas, one hundred bales of cotton which I may handle or control during said period, and to pay all customary charges thereon, in Galveston, including a commission of $1.25 per bale to said H. Kempner, for the sale and handling thereof (which commission shall include all charges thereon for one month except freight) and guarantee to ship and consign her at least one bale of cotton for every twelve dollars and fifty cents so advanced as aforesaid, or which she may hereafter advance me in view of such consignment, or in default of which to pay her, on said first day of January next, in lieu of said commission the sum of $1.25 per bale for each and every bale of cotton hereby agreed to be shipped and then remaining unshipped, being the amount agreed upon as liquidated damages which she will suffer thereby.

"All of my indebtedness to said H. Kempner, of whatever account, shall be payable in Galveston County, Texas, and the nonpayment of any part thereof, when due, shall at her option immediately mature the whole of said indebtedness.

Dated at Galveston, Texas, April 15, 1904.

(Signed) T. L. Patrick.

"We hereby guarantee the faithful performance of the above contract

on the part of said T. L. Patrick, and agree to pay to said H. Kempner, in Galveston County, Texas, the amount of any default thereunder.

(Signed) W. L. Fuller
J. A. Stewart,
Don Bilberry."

It is alleged that the note and the cotton contract constituted one contract or agreement, and that in compliance with the cotton contract Patrick shipped to Kempner 100 bales of cotton of the value of $5,000 and in addition thereto 30 bales of the value of $1,500, whereby the note was fully discharged. That when the 30 bales of cotton were shipped Patrick instructed Kempner to apply the proceeds thereof to the payment of the note sued on, which would have fully discharged the same, but that Kempner without authority applied the same to the payment of other indebtedness of Patrick.

Defendants further allege that Kempner, without the consent of the sureties, agreed with Patrick to waive the time of payment of the note and thus changed the terms of the contract, whereby they were discharged; and further, that having the cotton in his hands Kempner, instead of holding the same for the security of the payment of the note, made to Patrick additional advances of $40 per bale thereon and applied the proceeds of the cotton to the payment thereof without the consent of said defendants, and in disregard of their rights. By reason of the facts pleaded it is claimed that the sureties are discharged from all liability on the note.

The evidence shows that the note and cotton contract were executed substantially as claimed by appellees and that they signed the note as sureties for Patrick, which fact was known to Kempner.

Before the shipment of any of the cotton Kempner agreed with Patrick to advance him an additional $40 per bale on all cotton shipped, and the cotton was shipped upon bills of lading with drafts attached for $40 per bale thereof, which Kempner paid. Kempner also advanced or lent Patrick in addition $500 on cotton shipped and to be shipped. After having shipped 102 bales of cotton, on November 14, 1904, Patrick wrote Kempner as follows:

"Barstow, Texas, November 14, 1904.

"Mr. H. Kempner, Galveston, Texas.

"Dear Sir: Yours of yesterday to hand, notifying me of my note being due, in regard to which I will say: You will find B-L for three bales of cotton. I want to ship you from now on and not draw on the cotton. I don't want to sell now, and I want you to hold my cotton and credit me with $40 per bale as I ship to you. I will have some 60 bales yet to ship you. Mr. Lawson, while here, said if I was not in a position to pay my note when it became due, that you would extend it for me, which now I will kindly ask you to do.

"Hoping that this will meet with your approval and to hear from you soon, I remain, respectfully yours,

T. L. Patrick."

To which Kempner replied:

"November 16, 1904.

"Mr. T. L. Patrick, Barstow.

"Dear Sir: We are in receipt of yours of the 14th, with bill of lading, for which we are obliged. It is unnecessary to credit you with $40 per bale on your note. Just send along your cotton shipments to cover your note approximately, and we will carry your cotton until you are ready to sell, and your note likewise. All we want you to do is to put sufficient cotton in hand to cover same. Yours truly,

H. Kempner."

Thereafter Patrick shipped 31 bales of cotton, upon which he received no further advances.

The cotton was held for some time at the request of Patrick, and when finally sold, in January, 1905, the net proceeds thereof lacked $598.43 of being sufficient to pay the $40 per bale advanced by Kempner in payment of drafts attached to the bills of lading, and the $500 also advanced, leaving nothing to be applied to the payment of the note.

The net proceeds of the 31 bales shipped after the date of the letter of November 14, and upon which no advances were specially made, amounted to $948.60. The note was due November 17, 1904.

The trial court did not err in admitting in evidence the cotton contract, as complained of in appellant's first assignment of error. The evidence shows that the note and cotton contract constituted in fact one contract. The terms of the cotton contract itself furnish indubitable evidence of this. Both instruments bear the same date and were executed at the same time and as parts of one transaction. The contract shows that the $1,250 secured by the promissory note was advanced by Kempner upon the cotton agreed to be shipped and consigned to Kempner by the contract, being $12.50 per bale on each of the 100 bales so agreed to be shipped. Appellant's contention that the note is to be treated as a separate and independent transaction can not be sustained. What may be properly said in this connection will dispose of many of the questions raised on this appeal without recurring in detail to the assignments of error by which they are more specially presented.

Kempner as a cotton factor had a lien on the cotton shipped under the contract, for the payment of the $1,250 advanced, for which appellees Fuller, Stewart and Bilberry were sureties, as signors of the promissory note. While this was a possessory lien and did not attach to the cotton until it came into the hands of Kempner, he owed to the sureties on the note the duty to preserve this lien and to do nothing to impair the same. This right of the sureties did not accrue alone upon the receipt of the cotton by Kempner, but they had a right and interest in the contract itself whereby Patrick had agreed to ship the cotton, in consideration of the $1,250 advanced upon the consignments. Kempner could not, without the consent of the sureties upon the note, absolve Patrick from the obligation to ship the cotton, for in this obligation the sureties had a direct interest. Nor could Kempner impose an additional and superior lien upon the cotton to be shipped under the contract by voluntary agreement to the detriment of the rights of the sureties upon the note to have the proceeds of the cotton applied to its payment. If he

did so, they were thereby discharged either wholly or *pro tanto* as the case might be. The doctrine applicable to such a case is thus stated:

"One of the most vital applications of equitable principles in the law of discharge is found in the rule which prevents the creditor from increasing the surety's risk by an improper disposal of securities. It may be stated as follows: If a creditor without the consent of the surety parts with or renders unavailable any security or fund which he has a right to apply in satisfaction of the debt, the surety is exonerated or discharged to the extent of the value of such security or to the extent of the impairment in its value. This principle is a corollary from the equitable doctrine underlying the surety's right of subrogation, and the law of subrogation therefore both supplies a means of testing the fact of discharge and defines its extent. The creditor is treated as a trustee of all securities in his possession, for the indemnity of the surety as well as for his own protection; and he is in equity bound to apply them to the advantage of both. Accordingly, if the creditor who has the means of satisfaction in his own hands chooses not to retain it and surrenders it to the principal debtor or allows it to pass out of his own hands, or for a consideration agrees to do so, or negligently impairs its value or loses control thereof, so that the right of the surety to be subrogated, should he at any time choose to pay off the indebtedness, is lost, the surety is discharged to the extent of his actual damage. Means of satisfaction, as used in this connection, signifies money or property in the lawful control of the creditor which he may rightfully retain and apply to the satisfaction of the debt without subjecting himself to an action, or funds within his reach which he is in duty bound so to apply." (27 Am. and Eng. Ency. of Law, pp. 516-518.)

This principle is so well sustained by authority that further citations in support thereof are unnecessary. It needs only to apply the principle to the facts of the present case. If, being under no necessity to do so in order to obtain the cotton, Kempner agreed with Patrick, without the consent of the sureties on the note, to advance him $40 per bale on the cotton in addition to the $12.50 per bale advanced for which the note was given and for which, as soon as the cotton should come into his hands, he would have a lien for the payment of the same, thus impairing or destroying the security held by him for the note, the sureties would be discharged; as it appears that the proceeds of the cotton were ample to pay the note and that the $40 a bale further advanced absorbed the entire proceeds. Having the obligation of Patrick to ship the cotton upon which, when received, he would have a lien for the security of the payment of the money advanced, secured also by the note, Kempner had no more right without the consent of the sureties on the note, and to their detriment, to impair the security afforded by this obligation, than he would have to impair the security upon the cotton after it was received. The rules here laid down, however, would not apply if, as is contended by appellant, Kempner was compelled, in order to get the cotton, to agree to advance the $40 on each bale in addition to the $12.50 per bale secured by the note sued on. Kempner had no means of compelling Patrick to ship the cotton. In the event he refused to do so he could only demand of the sureties on the cotton contract the $125 commissions for handling the 100 bales. If, then, Patrick refused to ship

cotton unless Kempner agreed to make a further advance of $40 a bale, Kempner's agreement to do so in no way operated to the detriment of the sureties.

Similarly the sureties would have no right to complain if it was understood by them at the time the contract and note were signed that Kempner was to make further advances on the cotton, or if such was the general custom in transactions of this kind at Galveston, and the sureties had knowledge of such custom, but not unless they had such knowledge.

Appellant offered to prove by Patrick that the purpose of borrowing the money from Kempner and of the signing of the cotton contract was the buying of cotton and shipping the same to Kempner of which purpose the sureties had no notice, and that unless he had been permitted by Kempner to draw $40 per bale Patrick could not have shipped cotton to Kempner under the contract and Kempner could not have received the cotton, because drafts or such advances were in each instance attached to the bills of lading. Objection of defendants to this testimony was sustained, to which plaintiff excepted and presents the point involved by an appropriate assignment of error.

Appellees contend that the bill of exceptions is eviscerated by the statement at the foot of the bill signed by counsel for appellees, "Approved except that we can not concur in the conclusions of what the answer of the witness will be." This statement, however, is no part of the bill of exception which is allowed and signed by the district judge, without qualification. The bill states fully what the witness, if permitted to answer the question, would have testified, and we must assume from the unqualified allowance by the judge that he intended to approve the bill in spite of the nonconcurrence of counsel for appellees. The testimony should have been admitted. If true, it was a complete defense to the claim of appellees that they were discharged by the act of Kempner in making this further advance on the cotton and applying the proceeds to the payment thereof.

Similar testimony was offered and upon the objection of appellees excluded as set out in the fifth and sixth assignments of error. The bills of exceptions are followed by similar statements signed by counsel for appellees, that they do not concur in the statement as to what the witness would have testified, if permitted to answer, and are in the same way allowed and signed without qualification by the district judge. The testimony set out in these bills of exceptions should have been admitted.

Appellant should also have been allowed to prove the general custom at Galveston among factors and commission men in regard to transactions such as the one the basis of this suit, provided it could further be shown that such custom was known to appellees. If it was a general custom and not confined to Galveston, probably such knowledge would not have to be shown, but would be presumed. (29 Am. & Eng. Ency. of Law, pp. 397, 398 n 2.)

We think that the letter of November 14, 1904, must be taken as an application by Patrick of the net proceeds of the 31 bales of cotton to the payment of the note. Kempner's reply shows that he so understood it. It does not matter that the cotton was not to be sold until ordered. Patrick had a right to direct that when sold the net proceeds should

be applied to the payment of the note and this application bound the proceeds when thereafter realized. We are of opinion, however, that under the terms of the cotton contract Kempner had the right to deduct from the proceeds of this 31 bales of cotton $12.50 a bale and appropriate that sum towards the payment of the $500 advanced. This $500 was advanced on the faith of the cotton contract to the extent of $12.50 per bale and Kempner had a factor's lien upon the 31 bales of cotton to that extent which was superior to Patrick's right to apply the proceeds to the payment of the note.

Other assignments of error do not require notice.

For the errors indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

J. WRIGHT v. L. A. ISAACKS ET AL.

Decided May 15, 1906.

1.—Mistake in Deed—Description—Agent—Sub-agent.

A resident of another State owned a number of lots in a town in Texas; for the sale of said lots she appointed as her agent a party who did not live in said town and who, she must have known, could not give his personal attention to all the details in making sales; said agent, without express authority from the owner, appointed a local sub-agent to perform such merely ministerial acts as pointing out on the ground the lots to be sold; receiving offers to purchase and transmitting the same to the agent; and informing purchasers as to the proper description by number on the map of the town of the lots pointed out. Held, the power of the agent to delegate to the sub-agent the performance of such acts could be implied from his own agency; the acts of the sub-agent would be binding on the principal, and the mistake of the sub-agent in the description of a lot sold and conveyed by the principal would be held the mistake of the principal.

2.—Same—Limitation.

Against the right to correct a mistake in the description of land in a deed limitation will begin to run from the time the mistake was actually discovered, or from such time as by the exercise of reasonable care and diligence it might have been discovered. This is ordinarily a question of fact for the jury.

3.—Deed—Parol Sale.

Where by mistake in the description in a deed an entirely different tract of land is conveyed from the one actually bargained for and intended to be conveyed the transaction can not be treated as a parol sale of the land intended to be purchased.

ON REHEARING.

4.—Deed—Misdescription—Equitable Rights.

If a purchaser goes into possession of land bargained for and intended to be purchased, pays the purchase money and makes valuable improvements upon the faith of his contract, his right in equity to claim the benefit of such parol contract of sale will not be affected by the fact that a deed was executed which by mistake conveyed an entirely different tract of land.

Appeal from the District Court of Liberty County. Tried below before Hon. L. B. Hightower.

Nugent & Foster and *H. E. Marshall,* for appellant.—The court erred

in holding that Tom Peebles was not the agent of Mrs. Jemison to designate, point out and put parties into the possession of the property she sold at Cleveland, Texas. Insurance Co. of North America v. Thornton, 89 Am. St. Rep., 30 (13 Ala., 222); McKinnon v. Vollmar, 17 Am. St. Rep., 178 (75 Wis., 82); Williams v. Moore, 24 Texas Civ. App., 404; Renwick v. Bancroft, 56 Iowa, 527; Barnes v. Downes, 2 Texas App. Civil Cases, 474; Bradstreet v. Gill, 72 Texas, 115-117; Missouri, K. & T. R. R. Co. v. McMadden Bros., 89 Texas, 139.

The court erred in refusing to charge the jury on the law as applicable to oral sale, because the uncontroverted facts show that such oral sale was made by Mrs. Jamison to C. C. Cherry, and by Cherry to plaintiff, of lots Nos. five and six in block No. five (5), and that Cherry was put in actual possession of same, and that Cherry put plaintiff in the actual possession of same, and plaintiff is now in possession of same. Castleman v. Sherry, 42 Texas, 61, 62; Ponce v. McWhorter, 50 Texas, 571; Willis v. Matthews, 46 Texas, 483; Murphy v. Stell, 43 Texas, 133; Harold v. Sumner, 78 Texas, 581.

The court erred in holding that plaintiff's suit was barred by the statute of limitation of two or of four years, because in cases of mutual mistake, as in this case, limitation begins to run only from the discovery of the mistake, or when it ought to have been discovered; and when it ought to have been discovered, or when it has been discovered, are questions for the jury. Oldham v. Medearis, 90 Texas, 506; Emerson v. Navarro, 31 Texas, 341; Gould v. Emerson, 39 Am. St. Rep., 501; Stone v. Hale, 52 Am. Dec., 185.

Stevens & Pickett, for appellees.—An agent who has been authorized to sell land has no power to verbally appoint a subagent to sell the same, and the acts of such subagent in reference to the land do not bind the principal. Tynan v. Dullnig, 25 S. W. Rep., 465; Smith v. Sublett, 28 Texas, 169.

The same parties in the very same transaction can not convey the same land, both by deed, and at the same time by parol sale of the land involved in the one identical transaction. Chicago, T. & M. C. Ry. Co. v. Titterington, 84 Texas, 225.

To constitute a contract it is absolutely essential that the minds of both parties meet, and also there can be no correction of a mistake entirely unilateral, but the mistake must be mutual to be entitled to correction. May v. San Antonio & A. P. Townsite Co., 83 Texas, 505.

The court was correct in instructing a verdict for the defendants, for the reason that the cause of action, if any plaintiff ever had, was barred by the statute of limitations of four years, as the same was a suit to correct a mistake in a deed, which mistake could, by the use of ordinary and reasonable diligence, have been ascertained more than four years before the institution of this suit. Bremond v. McLean, 45 Texas, 10; Ransom v. Bearden, 50 Texas, 120; Kuhlman v. Baker, 50 Texas, 636; Calhoun v. Burton, 64 Texas, 515; Bass v. James, 83 Texas, 110; Cooper v. Lee, 75 Texas, 123; Cohn v. Shwarts, 32 S. W. Rep., 820; Vodrie v. Tynan, 57 S. W. Rep., 681; Boren v. Boren, 12 Texas Ct. Rep., 170; Oldham v. Medearis, 90 Texas, 508; Rowe v. Horton, 65 Texas, 90.

REESE, ASSOCIATE JUSTICE.—J. Wright brought this suit against L. A. Isaacks, Wm. Morris and Mrs. Louisa A. Jemison to recover lots 5 and 6 in block 5 in the town of Cleveland, and to correct a certain deed executed by Mrs. Jemison to C. C. Cherry, and also a deed from Cherry to himself for lots 5 and 6 in block 8 in said town, which said deeds, it is alleged, were intended to convey lots 5 and 6 in block 5, but by mistake in the description of the property really sold by Mrs. Jemison to Cherry and by Cherry to plaintiff, described said property as lots 5 and 6 in block 8. Plaintiff also sought to cancel a certain deed from Mrs. Jemison to Wm. Morris and also a deed from Morris to L. A. Isaacks for said lots 5 and 6 in block 5, and to remove cloud, etc.

The trial court instructed the jury to return a verdict for defendants and, motion for new trial being overruled, plaintiff Wright appeals.

The lots in question belonged to Mrs. Louisa A. Jemison, who lived in Alabama, but who had appointed N. S. Meldrum, who lived in the city of Houston, her agent for the sale of the lots. Meldrum was general manager of the Houston, East & West Texas Railroad. Mrs. Jemison owned a great many lots in the town of Cleveland, and Tom Peebles, who was the local agent of said railroad company at Cleveland, had been authorized by Meldrum to attend to the sale of the lots, advising Meldrum when such sales were made, whereupon Meldrum would procure deeds from Mrs. Jemison and send the same to Peebles who would deliver the same to the purchasers and collect the purchase money. These lots were in the woods and unmarked in any way. The town was very small, containing about 75 inhabitants, and the town tract was densely overgrown with trees and bushes.

In September, 1896, C. C. Cherry desiring to purchase two lots in the town located at a certain place, applied to Peebles and pointed out the lots he wanted. Peebles went out and showed Cherry the lines of the lots which were in fact, according to a map of the town in Peebles office, lots 5 and 6 in block 5. The price of the lots was $25 each, and Cherry paid Peebles $5 each as earnest money. Peebles then reported the sale to Meldrum, who reported to Mrs. Jemison in Alabama, and she executed a deed to Cherry for the lots describing them as lots 5 and 6 in block 8. Cherry paid the balance on delivery of the deeds. It is not definitely shown how the mistake occurred. Cherry did not notice the mistake, but at once took possession of the lots as selected by him and the lines of which had been shown him by Peebles, and began to clear and improve the same, enclosing the lots with a fence, and planted some trees. Cherry continued in possession of the lots until January, 1900, when he sold them to appellant, conveying them by deed as lots 5 and 6 in block 8. Appellant took possession of lots 5 and 6 in block 5 under this deed, having no notice or knowledge that the deed did not describe the lots bought by him of Cherry. Afterwards in September, 1901, appellant bought, through Wm. Morris, agent of Mrs. Jemison, lots 5 and 6 in block 8, and received a deed from her for the same. In 1902, when he came to render this property for taxes he discovered, for the first time, the mistake in the deed from Cherry to himself and from Mrs. Jemison to Cherry, for the two lots first sold, his attention being called to the fact that he had two deeds for lots 5 and 6 in block 8. He

then applied to Morris, who was the agent of Mrs. Jemison, to have the first deed corrected and left the deed with him for that purpose, as testified by appellant, but Morris instead of doing so procured a deed from Mrs. Jemison to himself for lots 5 and 6 in block 5 in May, 1902, and a few days thereafter sold and conveyed the same to L. A. Isaacks. Both Morris and Isaacks had full knowledge of appellant's claim to these lots. This suit was instituted in July, 1902.

Two propositions are presented by the assignments of error arising upon the evidence, in view of the peremptory instruction to the jury to return a verdict for defendants.

1. Conceding that the mistake in the description of the lots conveyed to C. C. Cherry by Mrs. Jemison was a mutual mistake of Peebles and Cherry and that Peebles intended to sell and Cherry to buy lots 5 and 6 in block 5, was Mrs. Jemison affected by such mistake?

2. If Mrs. Jemison is affected by the mistake, is this action to have the deed corrected barred by the statute of limitations of four years pleaded by defendants?

The evidence shows that Peebles had no authority from Mrs. Jemison to sell the lots. What authority he had was from N. S. Meldrum, the agent of Mrs. Jemison for that purpose. The evidence tends to show that he was authorized by Meldrum to point out to intending purchasers lots they desired to purchase, to receive offers to buy, with the necessary part payment or earnest money, to transmit such offers to Meldrum, advising him of the sale, and to receive from Mrs. Jemison through Meldrum deeds for lots so sold and to deliver the same to the purchasers, collecting the purchase money. In this way he had, as testified by him, sold a great many of the lots, probably as many as one hundred. A map or plat of the town was kept by Peebles in his office, by which the numbers of lots and blocks could be determined. It may be conceded that Peebles had not full authority as an agent of Mrs. Jemison to sell lots, and that Meldrum being an agent of Mrs. Jemison himself for that purpose, could not delegate such authority to Peebles. Meldrum, however, in his capacity of agent could authorize Peebles to perform such merely ministerial acts with regard to the subject matter of his agency as did not involve the exercise of judgment and discretion, such as pointing out the lots to be sold upon the ground, receiving offers to purchase and transmitting the same to Meldrum, and also advising and informing purchasers as to the proper description of lots by numbers on the map of the town when the same were pointed out by him. The power of Meldrum to delegate to Peebles the performance of such acts may be implied from his own agency, and the acts of Peebles under such delegated authority would be binding upon the principal, Mrs. Jemison. (Mechem on Agency, sec. 193; 1 Am. & Eng. Ency. of Law, 978-980; Williams v. Moore, 24 Texas Civ. App., 404; McKinnon v. Vallmar, 17 Am. St. Rep., 178; Renwick v. Bancroft, 56 Iowa, 527.)

When Peebles speaks, in his testimony, of having sold lots for Mrs. Jemison, it must be understood that he was performing such acts as he was authorized to perform in relation to such sale. His act, after the lots were pointed out to Cherry, in examining the map and getting therefrom a proper description of the lots in order that he might advise Meldrum and through him, Mrs. Jemison as to the lots applied for, was

as much a purely ministerial act as the designation of the lots on the ground, and involved the exercise of no more judgment and discretion. To that extent, at least, his acts would be binding upon Mrs. Jemison upon the principle that the appointment of Meldrum as her agent for the sale of the lots carried with it, by implication, the power upon his part to authorize Peebles to perform such acts, in relation to their sale.

The evidence showed that Meldrum was general manager of an important line of railway, with headquarters at some distance from the town where the lots were located, that his time was entirely taken up with the discharge of the duties of this position, and that he was rarely in Cleveland and when there only remained a few minutes at a time. All of this must be presumed to have been known to Mrs. Jemison who must have known that he could not personally act for her in such unimportant matters as were confided by Meldrum to Peebles. For several years Peebles continued to act in this capacity in arranging for the sale of lots, just as was done by him in the present instance, and afterwards he was compensated for just such services as he performed, in relation to the sale to Cherry, by Mrs. Jemison by conveying to him town lots in Cleveland. It is questionable whether the circumstances would not imply the power in Meldrum to delegate to Peebles much larger powers than such as would be necessary to bind Mrs. Jemison by his acts in the matter of the description of the lots sold to Cherry. The authority of an agent is always construed to include the necessary and usual means to execute it properly. (Mechem on Agency, sec. 194; Barnes v. Downes, 2 Texas Civ. App., 474.) It is unreasonable to suppose that it was intended by Mrs. Jemison that Meldrun would undertake personally to do what Peebles did and what was necessary to be done in relation to the sale to Cherry, and she ought not to be allowed now, after having availed herself of his services and received the full benefit thereof, to shelter herself behind the plea that the mistake in the description of the lots in fact bought by Cherry was Peebles' mistake for which she is not responsible. The conclusion is unavoidable that she intended to sell and convey the lots which Peebles had pointed out to Cherry. Peebles' mistake in the matter of the description, however it occurred, is her mistake. This view is further supported by the fact that Mrs. Jemison afterwards sold and conveyed to appellant lots 5 and 6 in block 8, which she had, according to her contention now, previously sold and conveyed, not by mistake but intentionally, to Cherry. The lots were of equal value as shown by the price paid by appellant for the same. The undisputed evidence shows, we think, that both on account of the nature of the act performed by Peebles in relation to the misdescription of the lots in the deed, and on account of the circumstances which rendered it reasonably necessary that Meldrum should employ Peebles in this capacity in making sale of lots, which necessity must have been known to Mrs. Jemison, he acted as her agent in the matter, and she is bound by his act which in some way resulted in the mistake in the description of the lots sold.

Both Morris and Isaacks bought with full notice of appellant's claim herein asserted, and are in no better position to defend the action than their codefendant, Mrs. Jemison.

In regard to the plea of the statute of limitations interposed by ap-

pellees, we think that this issue should have been submitted to the jury. The statute began to run from such time as the mistake in the description of the lots was discovered by appellant or his vendor Cherry, or if it should or might have been sooner discovered by the exercise of reasonable care and diligence, then from the time when it ought to or might have been so discovered. The deed was executed in October, 1896. The evidence shows that the mistake was in fact discovered in April, 1902, and this suit was instituted in July, 1902. If, by the exercise of reasonable care and diligence, the mistake might have been discovered by Cherry more than four years before the institution of this suit, the action would be barred by limitation.

Without discussing the evidence upon this point we think it fairly raises the issue as to whether the action was barred at the date of the institution of the suit, and the issue should have been submitted to the jury under proper instructions. It can not be said as matter of law, from the evidence in the record, that Cherry by the use of reasonable care and diligence would or might have discovered the mistake in his deed more than four years before the institution of this suit.

We can not agree with appellant's contention that the sale can be treated as a parol sale. Unless the deed can be corrected for misdescription of the lots, it must stand as a conveyance of lots 5 and 6 in block 8. Clearly it can not be said that there was a parol sale of lots 5 and 6 in block 5, and growing out of the same transaction a sale evidenced by a deed of lots 5 and 6 in block 8.

For the errors herein pointed out the judgment is reversed and the cause remanded.

ON REHEARING.

The motion for rehearing filed by appellees is overruled, in which we all concur. Upon further consideration, however, the majority of the court does not agree with the writer, who also wrote the opinion upon the reversal of the judgment, in the following statement in the opinion:

"We can not agree with appellant's contention that the sale can be treated as a parol sale. Unless the deed can be corrected for misdescription of the lots, it must stand as a conveyance of lots 5 and 6 in block 8. Clearly it can not be said that there was a parol sale of lots 5 and 6 in block 5, and growing out of the same transaction a sale evidenced by a deed of lots 5 and 6 in block 8."

It is the opinion of the majority that if Cherry went into possession of lots 5 and 6 in block 5, paid the purchase money and made valuable improvements upon the faith of his contract with Peebles to buy these particular lots, it would not affect his right to claim the benefit of such parol contract of sale in equity, that a deed was executed in pursuance of such contract which, on account of the mistake in the description of the lots was not, in fact, a conveyance of the lots really embraced in such contract.

Appellees contend that the conveyance relied on by appellant is a conveyance of lots 5 and 6 in block 8, and can not be treated as a conveyance of lots 5 and 6 in block 5; that in fact appellant must stand upon it as a conveyance of the former.

This leaves the case, in the opinion of the majority of the court,

resting, so far as lots 5 and 6 in block 5 are concerned, upon the parol contract alone, and entitled appellant to claim all of the benefits which a court of equity would give him from such parol contract; if the other facts and circumstances, such as placing in possession, payment of purchase money, and valuable improvements are such as to authorize such relief. The writer adheres to the opinion, upon this point, as expressed in the main opinion. My view is, in addition to what is said in that opinion, that the possession, payment of purchase money, and improvements were not upon the faith of the parol contract of sale, but upon the faith of the executed conveyance. If appellant has by his own laches lost his remedy of having the deed corrected he must stand upon the deed and can not stand upon the parol contract of sale. (6 Pom. Eq. Juris., sec. 678; Daggett v. Ayer, 65 N. H., 82.)

Nothing that is here said is intended to affect what is said in the opinion with regard to the issue of limitation.

Reversed and remanded.

Writ of error dismissed for want of jurisdiction.

GREAT WESTERN OIL COMPANY v. FRANK H. CARPENTER ET AL.

Decided May 15, 1906.

1.—Contract—One Dollar Consideration.

The payment of one dollar as a consideration for the execution of a contract is a mere nominal consideration and is not of itself sufficient to support the contract.

2.—Unilateral Contract.

A contract which is unilateral and which places no obligation on one of the parties thereto is without consideration and not enforceable.

3.—Lease Contract, Valid.

A contract which binds the lessee unconditionally, and not at his option, to do specified work within a specified time upon the leased premises, is not unilateral or unenforceable for want of a consideration. The fact that the lessee can not be compelled to do the specific work agreed to be done by him, and that the remedy by suit for damages would prove inadequate, is immaterial. The lessor can not complain of a contract which he deliberately entered into.

4.—Same—Cases Distinguished.

A contract of lease which imposed upon the lessee an unconditional obligation to sink one or more wells on the leased lands within eighteen months and to commence work on the first well within six months from date of contract, and which allows the lessee no option in the matter, is valid and enforceable; and the fact that the lessor reserves the right to terminate the lease upon default on the part of lessee. does not render it otherwise. The cases of Hodges v. Brice, 74 S. W. Rep., 590; Emery v. League, 72 S. W. Rep., 606; Roberts v. McFaddin, 74 S. W. Rep., 105; National Oil Co. v. Teel, 95 Texas, 586, discussed and distinguished.

5.—Same—Sufficient Consideration.

A release by the lessee of a part of the land embraced in the first contract is a sufficient consideration to support a second contract based upon and growing out of the first; and a release of all rights under the second contract was a sufficient consideration to support a third contract to convey a part of the leased land and pay a certain sum of money.

6.—Same—Same.

Agreements made in good faith in compromise of claims, even though of doubtful validity, should be enforced.

7.—Money Demand—When Due—Contingency.

Where in the settlement of business transactions the defendant placed in plaintiff's hands a certain tract of land to be sold by him, and agreed to pay plaintiff a certain sum of money out of the proceeds of the sale of said land, such sum is not due until the land is sold.

Appeal from the District Court of Harris County. Tried below before Hon. Norman G. Kittrell.

Clay S. Briggs and *S. S. Hanscom*, for appellant.—The court erred in its conclusions of law in holding that the contracts of lease of January and July, 1901, were both unilateral, putting no obligation on the plaintiff to do anything. National Oil & Pipe Line Co. v. Teel, 95 Texas, 586; Emery v. League, 31 Texas Civ. App., 474; Roberts & Corley v. McFadden, 32 Texas Civ. App., 47; 4 Amer. & Eng. Ency. of Law (2d ed.), p. 49, par. 8.

The court erred in its conclusions of law in holding that the leases of January 28, 1901, could not be made the basis for the lease of July 20, 1901, because said conclusion was contrary to the law and evidence, for the reason that it appears from the said lease of July 20, 1901, and from the recitals therein and other uncontradicted evidence that a good and valuable consideration was given by plaintiff to defendants for the execution of said lease of July 20, 1901, to wit: the payment of one dollar and the release of twenty-five acres out of the 145 acres embraced in one of said leases of January 28, 1901, before the expiration of said lease, and that at the time of the execution of said lease of July 20, 1901, the said leases of January 28, 1901, were valid and binding agreements on defendants, and each of them, as options, if not as leases, and constituted a consideration good and valuable in law for said lease of July 20, 1901. National Oil & Pipe Line Co. v. Teel, 95 Texas, 586, 591; Emery v. League, 31 Texas Civ. App., 474; Roberts & Corley v. McFadden, 32 Texas Civ. App., 47; Davis v. Wells, 104 U. S., 159; 21 Amer. & Eng. Ency. of Law, (2d ed.), 927, par. 3; Ibid., vol. 6 (2d ed.), pp. 678, 703, 722, 723, with notes; Sanborn v. French, 22 N. H., 246; Bishop on Contracts (ed. 1887), secs. 68, 1344 and 1439.

A. L. Davis, for appellees.—The court did not err in his conclusion of law that the leases sued on by plaintiff were unilateral, and placed no obligation on plaintiff, and that plaintiff having never in fact done anything under said leases, they were nonenforceable, and not binding on defendants. Hodges v. Brice et al., 74 S. W. Rep., 590; Roberts et al. v. McFadden et al., 32 Texas Civ. App., 47; Emery v. League, 31 Texas Civ. App., 474; National Oil, etc., Co. v. Teel, 67 S. W. Rep., 546; National Oil, etc., Co. v. Teel, 95 Texas, 586; Foster et al. v. Elk Fork Oil & Gas Co., 32 C. C. A., 560; Petroleum Co. v. Coal, Coke Mfg. Co. (Tenn.), 18 S. W. Rep., 66; Bishop on Contracts, sec. 78, pp. 32, 33; 7 Am. & Eng. Ency. of Law, (2d ed.), 114; Chitty on Contracts, p. 297; Thornton on Law Relating to Oil and Gas, sec. 66.

Forbearance to insist upon a claim that is not enforceable or the sur-

render of such claim can not be a consideration for a new promise or contract. Steger v. Hume, 79 S. W. Rep., 21; Beland v. Anheuser-Busch Brewing Assn. (Mo.), 58 S. W. Rep., 1; Parsons on Contracts, p. 176; Clarke on Contracts (9th ed.), p. 474—bottom paging.

REESE, ASSOCIATE JUSTICE.—This suit was instituted by the Great Western Oil Company against F. H. Carpenter and his wife, M. A. Carpenter, for the recovery of $1,000 in money, and also for the recovery of a certain tract of 2.82 acres of land. Plaintiff prayed in the alternative that if it was held not to be entitled to recover the money and land, that it be reinstated in its rights under a certain oil lease which had been cancelled by agreement of the parties in consideration of the promise of defendants to pay the money and convey the tract of land sued for.

Upon trial without a jury there was a judgment for defendants from which plaintiff appeals.

The material facts are as follows: On January 28, 1901, defendants and one W. N. Fritter executed two certain contracts or agreements substantially identical in their terms, except as to the land covered thereby, one contract embracing 400 acres of land in Jefferson County, and the other 145 acres in Hardin County. By the terms of the contracts, in consideration of one dollar recited as having been received by defendants, and the covenants on the part of Fritter therein contained, defendants leased to Fritter for the term of ten years, unless sooner terminated under the terms of the contract, the aforesaid tracts of land "for the purpose of boring, mining and operating for oil, gas, coal and other minerals on said land." The contracts contained the usual stipulations for the exclusive right of Fritter to mine and bore for oil, gas, coal and other minerals, and for the delivery to the lessors of a specific proportion of the product of such operations, if successful, with power in the lessee to transfer or sublease, and, at his option, to renew the lease for ten years or so long as the land produces oil, gas, coal or other minerals, if any ever found.

Each of these lease contracts contain the following clause:

"The party of the second part hereby agrees to sink one or more wells on said land within 18 months from date hereof, work on the first one of which shall be commenced within six months from the date hereof. In the event of failure to so commence work on said well within six months from date hereof, the parties of the first part may, at their option, cancel this lease, unless the same be renewed for one year by the party of the second part by the payment of the annual rental of ten cents per acre."

Both of those contracts were afterwards assigned by Fritter to the Great Western Oil Company, appellant herein, who became thereby vested with all of the rights and bound by all of the obligations of Fritter.

On July 20, 1901, which was eight days before the expiration of the six months within which the lessee was to commence work on the wells to be bored under the contract under the clause therein, above quoted, appellant and appellees entered into a new agreement or contract whereby in consideration of one dollar acknowledged to have been received by appellees and the further consideration of the stipulations of the contract, appellees granted and sold to appellant for a continuous period of

fifty years with privilege of renewal for an equal term "all of the oil, gas, coal and other minerals under and upon the 400 acre tract covered by one of the first leases aforesaid and 120 acres of the 145 acres covered by the other of said leases, with the usual provisions for right of ingress and egress and occupancy for drilling, mining and operating for oil, coal, gas and other minerals, the erection of machinery, laying pipe lines, etc., and stipulations for the payment to appellees of a certain proportion of the output of such operations.

In consideration of the execution of this contract appellant released all of the land covered by the two leases executed to Fritter and assigned to appellant from said leases, and expressly released therefrom the 25 acres embraced in said lease of 145 acres and not embraced in the last contract.

This contract contained the following clause; "In the event work on a well sinking pipe either for oil or gas is not begun within nine (9) months from date hereof and completed within fifteen months thereafter on each of said two tracts of land and not abandoned until pipe is down at least 800 feet, unless oil is found at a less depth, then this grant and lease shall become null and void as to both parties of the first and second parts hereto."

On March 24, 1902, the parties entered into another contract which is as follows:

"The agreement this day made between F. H. Carpenter and R. L. Heflin for himself and the Great Western Oil Company is as follows:

"In consideration of the cancellation by the Great Western Oil Company of its lease on section 34 of the T. & N. O. R. R. Co. survey in Jefferson County, Texas, and on 120 acres, more or less, in the Jackson league in Hardin County, Texas, which two tracts of land are more fully described in an instrument of writing between said Carpenter and the Great Western Oil Company, dated the 20th day of July, 1901, the said Carpenter agrees to pay to the Great Western Oil Company the sum of $1,000 out of the first money realized from the sale of 50 acres of said land, and further agrees to deed lot No. 1 to said company or its assigns. Said lot being situated in the northeast corner of said 120 acre tract and measuring 301 feet from east to west by 409 1-3 feet from north to south, and agrees to place the balance of said 120 acre tract in the hands of A. E. Bush and R. L. Heflin for sale for his, Carpenter's, account, at such price per lot or per acre as he, the said Carpenter, may from time to time designate, paying them five percent commission on sales as made.

"The $1,000 is to be paid out of the proceeds of the sale of the first fifty acres of said land sold, that is, each of the fifty acres that is sold is to bear its fiftieth of the $1,000.

"Said Carpenter reserves the right to withdraw said land from sale at any time after ninety days from date hereof and reserves the right to retain the ownership of any one to five lots of said land."

This instrument was signed by the Great Western Oil Company and by F. H. Carpenter, but not by M. A. Carpenter, his wife, who signed all of the other contracts hereinbefore referred to. The omission of Mrs. Carpenter to sign, however, is not material.

On March 26, 1902, appellant executed to appellee F. H. Carpenter an express release of all of its right, title, claim or interest by virtue of the instrument of July 20, 1901.

At the date of the contract of March 24, 1902, there remained 26 days of the nine months within which, under the terms of the contract of July 20, 1901, work on a well had to be begun on each of the two tracts of land embraced therein, in default of which the contract was to become void as to both parties.

The trial court found, upon sufficient evidence, that no part of the 50 acres of land referred to in the last contract had ever been sold, and that therefore the basis for the payment of the $1,000 had never been created.

No work was ever, in fact, done by either Fritter or appellant towards boring or mining for oil, gas, coal or other minerals under any of the contracts.

The one dollar in cash, recited to have been paid to appellees, as a consideration for each of the two leases of January 28, 1901, and the lease of July 20, 1901, was in fact so paid as recited.

This suit was brought to recover the tract of 2.82 acres of land and the $1,000 referred to in the contract of March 24, 1902.

The trial court denied the right of recovery by appellant on the ground that the contracts of lease were unilateral contracts and without consideration, and therefore not binding upon appellees and that the release and cancellation thereof furnished no consideration for the contract of March 24, 1902, for the conveyance of the land, and the payment of the money which is the basis of this suit. The court further concluded that as to the $1,000 the condition upon which it was to be paid had not been complied with, in the sale of the 50 acres of land.

It is necessary to determine the nature of the first contracts between appellees and W. N. Fritter of January 28, 1901, which forms the basis of the subsequent agreements. The release of the 25 acres of the 145 acre tract embraced in that lease was one of the considerations for the execution of the contract of July 20, 1901. If therefore that lease was a valid lease and supported by a sufficient consideration the release of the 25 acres therefrom furnished a sufficient consideration for the contract, which was in fact an option, of July 20. Again if this last contract was supported by a sufficient consideration the cancellation thereof furnished a sufficient consideration for appellees' contract to convey the 2.82 acres and to pay the $1,000 sued for.

On the other hand, and for like reasons, if the first two leases of January 28, 1901, were, as found by the trial court, unilateral contracts and not enforceable for want of consideration, then not only those contracts, but both of those subsequent thereto, resting upon the first two, were without consideration and appellant is not entitled to recover.

The consideration of $1.00 recited as paid, and in fact paid, was merely nominal, and if the contracts were not supported by any other consideration we would have no hesitation in agreeing with the trial court. (Gulfey Petroleum Company v. Oliver, 79 S. W. Rep., 891; Federal Oil Co. v. Western Oil Co., 112 Fed. Rep., 376.) This was the case with other contracts, oil leases, or options to mine for and take oil, gas and other

minerals, which have been before the courts of this State and which have been held to be void or unenforceable for want of mutuality or for lack of valuable consideration to support the same.

We have carefully examined all of the cases cited by appellees in their brief, in support of the trial court's conclusion of law that the leases of January 28, 1901, were unilateral and placed no obligation on plaintiff, and were therefore without consideration and nonenforceable, and find that the contracts therein discussed were all different from the first lease contracts in this case, in the essential particular that the latter do impose upon the lessee an unconditional obligation to sink one or more wells on the leased lands within eighteen months and to commence work on the first well within six months from the date of the contract. No option is given the lessee to do this work or not, or to let the lease lapse on account of his failure if he so elects. In case of failure of the lessee to commence work on the first well within six months the option is given the lessors to cancel the lease, but unless the lessors choose to exercise this right of forfeiture or cancellation the lessee can be held, at all events, to a compliance with his obligation to do the work specified in the contract and expressly agreed to be performed by him. It is true that if the lessors elect to cancel the lease for default on the part of the lessees the lessees may prevent such cancellation and continue the lease in force for another year by paying to the lessors ten cents per acre per annum as rental, but that in no way affects the right of the lessors to demand at all events, a compliance on the part of the lessee with his express obligations under the contract to do the work specified.

This right in the lessee to continue the lease for one year on payment of the annual rental provided, only becomes effective in the event the lessors elect to exercise their option to cancel for failure to do the work specified in the contract. The result of such failure is not to put an end to the contract unless the lessors elect to have it so.

In the case of Hodge v. Brice (74 S. W. Rep., 590) the lease or option under discussion provided that if the lessee "fails to commence a well upon said premises within six months or unless he shall thereafter pay to the first party (the lessors) four dollars per month from month to month until the well is commenced this lease shall be null and void." It was optional with the lessee to either commence the well or to pay the four dollars per month, or to do neither, in which case the lease became null and void. The lease or option as declared by this court was held to be void, citing Emery v. League, 31 Texas Civ. App., 474. In the cited case which was decided by this court, the lease or option was of an undivided interest of 14 acres of land and the lessee undertook and obligated himself to have the land partitioned and to begin operations in good faith within six months after the final division of the land and to have six months thereafter within which to prospect the land and complete a well. It was held that the contract bound the lessee to have the land partitioned within a reasonable time, as otherwise there would be no time limit to the option granted him to prospect and develop the land, in which case the contract would be void for want of mutuality. The court says: "The primary purpose of the contract being the development of the land, if the lessee was not bound to proceed with such de-

velopment the lessor would not be bound to proceed with his part of the contract. No development could be made until the land was partitioned." The lessee not having complied with his contract to proceed to have the land partitioned within a reasonable time, it was held that he had forfeited his rights under the contract. The inference to be drawn from the opinion is that the contract would have been upheld if the lessee had complied with his agreement, which furnished a sufficient consideration for the contract. Applying the rule therein laid down to the facts of the present case, it would seem clear that the leases of January 28, 1901, were valid and the lessee entitled to all of the benefits of the grant unless and until forfeited, at the option of the lessor, for failure to begin operations within the six months, and complete a well on each tract within eighteen months as agreed.

In the case of Roberts v. McFadden (74 S. W. Rep., 105) the lease contract in question provided that the lessee might terminate it at any time, in which case the sum paid to the lessor should be his full compensation for any injury sustained. No sum had in fact been paid and the lessee not being bound to do or perform anything the contract was held to be unilateral and void.

To the same effect was the contract considered and pronounced void in the case of National Oil Co. v. Teel (67 S. W. Rep., 545) the decision of the question resting upon the fact that the contract did not bind the lessee to do anything.

We have not been able to find a case in which it has been held that a contract which binds the lessee, as the contracts of January 28 in the present case do, unconditionally, and not at his own option, to do specified work under a specified time upon the leased premises has been held to be a unilateral contract and unenforceable for want of consideration. (Springer v. National Gas Co., 145 Pa., 430; Foster v. Elk Fork Oil & Gas Co., 90 Fed. Rep., 178; Donahue on Petroleum & Gas, 156, et seq.)

It is no answer to what has been said that the lessee in the present case can not be compelled specifically to do the work agreed to be done by him, and that the remedy by way of a suit for damages for failure on his part must prove inadequate if not utterly futile for the reason that there are no means by which his damages can be measured. Appellees can not be heard to complain of these contracts, deliberately and understandingly entered into, on the ground that the obligations which they have exacted of appellant as a consideration for their own contract is of such a nature that it is difficult, if not impossible to determine the amount of their damages, in case of a violation of this agreement by appellant.

We conclude that the lease contracts of January 28, 1901, were valid contracts and were in full force, binding the land embraced therein, on July 20, 1901, when the second contract was executed. The release of the 25 acres of land out of the tract of 145 acres furnished a valuable consideration for the option contained in this last contract, which option would have continued until and unless forfeited, by its terms, for failure on the part of appellant to begin work in nine months and finish a well on each of the two tracts in fifteen months from the date of the contract. Until these contingencies occurred the land was bound by the

option contained in this contract. This contract imposed no express obligation on appellant to do any work, as a consideration of the option, but the release of the 25 acres from the former leases was sufficient consideration to support it.

A release of both tracts of land from this option was a sufficient consideration for the contract to convey the 2.82 acres of land and the payment of the $1,000 sued for herein.

This conclusion finds further support, if need be, in the principle that agreements made in good faith in compromise of doubtful claims, are to be enforced notwithstanding the claim asserted on the one side is denied on the other, and may appear to be invalid or unenforceable. (1 Pars. on Contracts, 438.)

We think that no importance is to be attached to the fact that appellant never took any steps to bore for oil on the land, or that it had no machinery for the purpose. It was not necessary that it should have such machinery on hand. It is not suggested that it could not, or that it would not, have begun operations under the first leases in time to save them from forfeiture. Rather than wait the eight days remaining to determine whether appellant could or would do the work required, appellees preferred to cancel the first leases, clearing the 25 acres, and executing the new contract as to the balance of the land, of July 20. Rather than wait the 26 days required to determine whether appellant could or would do the work required to be done to save the latter contract from forfeiture, appellee F. H. Carpenter preferred to take no chances but to give the 2.82 acres of land and promise to pay the $1,000 in manner provided, in order to get an immediate release of all of the lands from appellant's claim.

The judgment of the trial court does not rest upon any fraudulent misrepresentation on the part of appellant inducing the execution of any of the agreements by appellees. The evidence does not authorize such conclusion. The court found upon sufficient evidence that no part of the 50 acres of land had ever been sold, that appellee had fixed the price upon it as required by the contract, but that neither appellant nor its agent had ever sold any part of it. The $1,000 was to be paid out of the proceeds of this 50 acres when sold. It is not shown to be due and appellant's demand therefor in this suit can not be sustained.

The judgment of the trial court is reversed as to the 2.82 acres of land described in the contract of March 24, 1902, and judgment here rendered in favor of appellant therefor.

As to the claim for $1,000 the judgment is affirmed without prejudice to the right of appellant to sue for and recover the same whenever it may appear that it can be legally demanded under the terms of said contract.

Reversed and rendered in part.
Affirmed in part.

Writ of error refused.

GULF, COLORADO & SANTA FE RAILWAY COMPANY v. ANN JOHNSON.

Decided May 16, 1906.

1.—Release of Damages—Fraudulent Representations.

On the question whether a release of her claim for damages was procured by fraudulent representations made to plaintiff her testimony that no such representations were made or induced her to sign, was not conclusive against her where there was other evidence of their making and effect, and her impaired reason, occasioned by the injuries may have warranted a belief by the jury that she did not recollect what took place.

2.—Argument—Charge.

An unwarranted argument by counsel that a contract relied on by defendant as a release of damages was void under the statute of frauds should call for an instruction from the court correcting its erroneous effect.

3.—Fraudulent Representations—Knowledge.

A settlement, though induced by false representations by defendant's physician as to the extent of plaintiff's injuries is not to be set aside therefor unless the claim agent acting for defendant in the matter knew and availed himself of such representations by another or acted in conspiracy with him.

4.—Fraudulent Representations—Falsity.

Statements by a claim agent that settlement must be made now or the defendant would not thereafter take it up, and better terms could be had now than in the future must be shown to have been false to constitute ground for avoiding the contract.

Appeal from the District Court of Bell County. Tried below before Hon. John M. Furman.

J. W. Terry and *A. H. Culwell,* for appellant.—The settlement was not induced by any representations made to plaintiff. Houston & T. C. Ry. v. Tierney, 72 Texas, 312; Texas & P. Ry. Co. v. Moore, 8 Texas Civ. App., 296; Atchison, T. & S. F. Ry. Co. v. Click, 5 Texas Civ. App., 225; St. Louis S. W. Ry. Co. v. Caseday, 40 S. W. Rep, 199; Texas & P. Ry. Co. v. Hightower, 12 Texas Civ. App., 44; Williams v. Rand, 9 Texas Civ. App., 635.

A representation to amount to fraud must relate distinctly and directly to the contract and affect its very essence and substance. McAleer v. Horsey, 35 Md., 439; Coffee v. Newsom, 2 Ga., 442; Colton v. Stanford, 16 Am. St. Rep., 137.

The expression of an opinion as to a matter wherein opinions may differ, does not afford ground to set aside a settlement and satisfaction on the ground that the same was obtained by fraud. Atchison, T. & S. F. Ry. Co. v. Bennett, 66 Pac. Rep., 1018; Quebe v. Gulf, C. & S. F. Ry. Co., 10 Texas Ct. Rep., 296; Houston & T. C. Ry. Co. v. McCarty, 94 Texas, 301; Alabama & V. Ry. Co. v. Turnbull, 16 So. Rep., 345; Nelson v. Minnesota Street Ry. Co., 63 N. W. Rep., 486; Doty v. Chicago, St. P. & K. C., 52 N. W. Rep., 135; Denver & R. G. Ry. Co. v. Sullivan, 41 Pac. Rep., 501; Missouri, K. & T. Ry. Co. v. Smith, 68 S. W. Rep., 543; Burnham v. Burnham, 97 N. W. Rep., 176; Wrenn v. Truitt, 116 Ga., 708.

Pendleton, Ferguson & Durrett, for appellee.

FISHER, CHIEF JUSTICE.—This is a suit by the appellee against the appellant to recover damages on account of injuries resulting from the derailment of one of appellant's passenger trains upon which the appellee was a passenger at the time of the accident.

The defendant pleaded a general demurrer, general denial and specially that appellee, after the injuries, had executed a release in full settlement of the cause of action sued upon for all damages sustained by her on account of the accident in question; that by the contract of release the appellant paid the appellee $350, which was received by her as a full consideration for the settlement.

The plaintiff by supplemental petition attacked this release, first, on the ground that at the time it was executed she was *non compos mentis;* second, that its execution was procured by reason of the fraud and misrepresentations made by Dr. Scott, a physician in the employ of the company, and Mr. Lee, its claim agent. The supplemental petition charges that the representations so made by Dr. Scott and Mr. Lee were to the effect that the plaintiff was slightly injured and that she would be well in thirteen or fourteen days, and that in such time she would be able to perform her usual duties; that she was not severely hurt and that she had not sustained any serious injuries, except slight bruises; and that Mr. Lee represented and stated to plaintiff that if she did not settle her claim while in Brownwood, that she would never receive anything for her injuries at all, and that she must sign the release then and there. It is alleged that these representations and statements were not true; that they were falsely made for the purpose of inducing the plaintiff to execute the release, and that she believed the representations were true, and that in pursuance of such belief the release was executed.

The case was submitted to a jury and verdict was in favor of the plaintiff. The case as presented here raises no question as to the fact of the accident, and that it was the result of the negligence of the railway company, and that the plaintiff was a passenger, and that she sustained injuries to some extent as alleged. There were two issues submitted to the jury for their consideration in determining whether the release should be set aside: (1) Did the plaintiff have sufficient mental capacity at the time of its execution to understand the nature of the contract and the consequence of her act? (2) Was the execution of the release procured by reason of the alleged false and fraudulent representations. The verdict of the jury is general, therefore we are unable to say upon what ground or grounds the release was held to be invalid.

Appellant's first, second, third, fourth, fifth, sixth and seventh assignments of error attack the verdict on the facts, and, except in one particular which will be noticed hereafter, we are of the opinion that the facts were sufficient to support the verdict. Of course, if the plaintiff was *non compos mentis* at the time of the execution of the release, that of itself is sufficient to avoid it; but the issue of fraud, as raised by the pleadings, when considered in connection with the evidence of the plaintiff, presents an unusual question. The specific ground of fraud charged in the petition is that false representations were made to the plaintiff as to material facts, which she believed to be true at the time, which had the effect of so operating upon her mind as to induce her to execute the contract of release. The witnesses for the defendant testify

that at the time the release was executed the same was explained to the plaintiff, and that she knew what she was doing. Her sister who was in attendance upon her at that time, substantially testified the same way. She testified that plaintiff entered into the contract releasing the railway company against her wishes and consent, and that she tried to prevail upon the plaintiff not to execute the release; that the plaintiff knew what she was doing at the time, but she was persuaded and influenced in its execution by the representations of Dr. Scott. The plaintiff testified in the case and she states that the signature shown her appended to the release is her signature, but that neither Dr. Scott nor the agent Lee made any representations to her that induced her to execute the same, and that she has no knowledge whatever of that transaction.

Based upon her evidence the appellant raises the contention that the evidence as to the issue of fraud was not sufficient to justify a submission of that question to the jury, as the plaintiff has admitted that no representations were made to her that induced her to sign the release; that it necessarily follows that she could not have acted upon the representations, and that the same could not have operated to produce any influence upon her mind that led her to the execution of that instrument. There is no question in the evidence but that she executed the release, and there is abundant evidence tending to show that the representations were made that induced her to execute the same. Her testimony upon this subject does not necessarily have the effect of establishing the proposition that the representations were not made, and that she was not influenced thereby. Her mental condition at that particular time might have been such that the representations and statements might have made an impression upon her mind about which she had ceased to recollect at the time that she testified. Further, there is no pretense that she was actually insane, but her mental status was merely impaired or weakened by reason of her injuries and the consequent suffering that she was undergoing; and it was a question for the jury to say whether she had mind sufficient upon which an impression could be produced by the conduct and statements of those in attendance upon her at that particular time. The patient when recovered may not have a distinct or possibly any recollection of what has occurred during the period of her prostration; but still it is a fact, well known, that during that time she may be influenced by those in whom she has confidence, or by those who are undertaking to exert some control over her weakened intellect. Therefore, notwithstanding the evidence of the plaintiff, we are not prepared to say that the issue should not have been submitted to the jury.

All those assignments relating to the question of evidence are overruled, and also those that complain of the charge of the court and the refusal to give charges, except as hereinafter noticed.

The questions presented in the twenty-fifth and twenty-sixth assignments of error will possibly not arise upon another trial; but, however, we desire to say that if upon another trial any contention should be urged by the appellee that the statute of frauds applies to the contract of settlement as written, or the parol agreement with reference to hospital treatment, the appellant would be entitled to some character of instruction or ruling protecting it against any such contention.

The bill of exception, as set out under the twenty-sixth assignment of

error, undertakes to show that the jury was influenced by the remarks of one of the appellee's counsel to the effect that the release was void under the statute of frauds, for the reason that a part of it was reduced to writing and a portion of it was verbal. Statements of this character when made by counsel are often indulged in at the expense of having a verdict and judgment in their favor reversed in this court; but we will no longer dwell upon this subject, as the case will be reversed on other grounds, and it is not likely that the argument will be repeated.

The remark made by plaintiff to the jury, as set out in the bill of exceptions presented under the fourteenth and twenty-seventh assignments of error will doubtless not be repeated on another trial. It is in the nature of a personal appeal, not altogether based upon the evidence.

The appellant's eighth assignment of error complains of the following charge of the court: "Or, if you should find that plaintiff, Miss Ann Johnson, had mental capacity to know and understand the nature and effect of the signing of said release at the time she signed same, if she did sign it, but that she was caused or induced to sign the said release by the representations as alleged to have been made by Dr. A. C. Scott and T. J. Lee, or either of them, acting for or in behalf of the defendant, concerning her physical condition at the time of signing the said release, or concerning the time she would probably be disabled on account of the injuries she had sustained, or concerning the probability of her obtaining a better settlement of her claim while at Brownwood than after her return to her home; and if you further find that said representations were untrue, and that said A. C. Scott and Tom J. Lee knew or ought to have known that same were untrue at the time the same were made; and that the same were made for the purpose of inducing Miss Ann Johnson to act on them and for the purpose of deceiving and overreaching plaintiff; and if you further find that Miss Ann Johnson was deceived thereby and believed the same to be true, and relying thereon she signed said release, and was thereby induced to make a settlement for her said injuries for less than what she was in justice and equity entitled to receive, then if you so find you are charged that a release signed under such circumstances would not bind plaintiff, and would be no defense to this suit, notwithstanding the execution of said release, would be entitled to recover any damages the evidence may show that she had sustained as the direct and proximate result of any injuries caused by the derailment of said car."

This charge presents reversible error. There is evidence tending to show that Dr. Scott made representations concerning the physical condition of the plaintiff; and while there is a conflict in the evidence as to what were these representations, the jury had the right under the evidence to conclude that they were material, that they were not true, and that they were made for the purpose of inducing the plaintiff to execute the contract, and that they influenced her in so doing. The petition does not charge any conspiracy between Scott and Lee. And whether or not Lee knew that the representations made by Scott were not true, and whether or not he took advantage of those representations in order to procure the execution of the release are mere matters of conjecture; but if the evidence was such as to justify the conclusion that he knew that they were made for the purpose of influencing Miss Johnson to execute

the contract, and that they were not true, it is clear that he did not make them but they were made by Dr. Scott. The charge as framed not only presents the question as to whether Scott made the representations but as to whether they were made by Lee. They were not made by Lee, and the only way in which he could be held to be connected therewith would be upon the ground that there was a conspiracy between him and Scott, or that they were adopted by him, although made by Scott and used for the purpose of procuring a favorable advantage over the plaintiff. The only representations that were made by Lee were substantially to the effect that if plaintiff desired to settle the matter, she had better do so while at Brownwood, and that she could make a better settlement there; and there was some evidence to the effect tending to show that she would be given no other opportunity for settlement. Now it is a difficult matter to characterize this as a material representation; but possibly the jury might, in view of everything that transpired there as a part of the *res gestae* concerning the matter of settlement, have considered that the statement of Lee might have been given some weight by the plaintiff in leading her to execute the release. But, assuming this to be true, there is no evidence in the record that justifies the conclusion that this statement, if made by Lee, was false. It was a mere statement of Lee to the effect that the agreement must be executed at Brownwood, and that she could get better terms there than elsewhere. The jury might have considered it a part of the scheme to induce a settlement, but that is not enough; it must be shown that it was a misrepresentation or misstatement of the facts. So far as the evidence shows, if Lee made the statement, he may have intended everything stated. There must be more than a suspicion of falsity. It must be established directly or circumstantially, and if inferentially, the facts must be of a nature that would justify the inference. We repeat that the evidence is not sufficient to justify the conclusion that this statement was not true.

Without repeating what we understand to be the rules of law relating to attacks on the ground of fraud on instruments of the character of that in question, we refer to the cases of Gulf, C. & S. F. Ry. Co. v. Huyett, 15 Texas Ct. Rep., 503; International & G. N. R. R. Co. v. Shuford, 10 Texas Ct. Rep., 613, and Houston & T. C. R. R. Co. v. Brown, 5 Texas Ct. Rep., 127.

Having reversed the case for the reason just stated, we call attention to the instruction set out under the thirty-fifth assignment of error. The charge there requested is, to some extent, covered by the main charge of the court; but it would not be error for the court to give the instruction as framed.

Judgment reversed and cause remanded.

Reversed and remanded.

J. H. GAGE ET AL. v. C. T. HUNTER.

Decided May 16, 1906.

1.—Bond—Judgment.

Where the owner of cattle, pending a suit for foreclosure of a lien upon them for pasturage, took possession and sold and removed them, giving bond

to answer for any judgment on the lien foreclosure, on recovery of such judgment it was proper to render judgment also against him and his sureties on the bond for the amount so recovered, in favor of the assignees of the pasturage claim and lien, though he also recovered judgment against the assignor for damages for shortage in sale of the cattle to him by such assignor, who had continued to pasture them after the sale.

2.—Same—Assignment of Claim—Offset.

The claim of the purchaser of cattle against the seller, for damages by reason of shortage in the number sold, was not incident to or connected with that of the seller for their subsequent pasturage for the vendee, and could not be offset against a suit against him by the assignees of the claim and lien for pasturage.

3.—Evidence—Harmless Error.

In a trial before the court, the erroneous admissions of evidence is harmless error where there was other and unobjectionable evidence to prove the same facts sufficient to support the judgment.

4.—Contract—Parties.

The purchaser of property is not relieved from his obligations to the seller by the failure of a previous mortgagee to comply with contracts with the seller by which his mortgage was released, to which contracts the purchaser was not a party.

5.—Sale—Evidence.

Evidence considered and held to sustain a finding that a sale of cattle was intended to transfer the title to the purchaser, and not merely an arrangement for the seller to continue as owner carrying them and the mortgages upon them in the name of nominal purchaser.

Appeal from the District Court of Falls County. Tried below before Hon. Sam. R. Scott.

Two suits, afterwards consolidated, were brought by Hunter against Gage for pasturage of cattle and foreclosure of a lien on them therefor. Gage and his sureties gave bond to answer for the claim and lien and sold or removed the cattle. Hunter transferred his cause of action to Drought & Co. and Harlan, and they intervened as owners of the claim. Hunter had owned the cattle and they were mortgaged to secure notes given by him to a commission company. Hunter transferred them to Gage and the latter gave his own notes and a mortgage to the company and took up Hunter's. Gage claimed that this transaction was merely to secure an extension of the indebtedness of Hunter, who remained the actual owner and was pasturing them for himself. Hunter and the interveners claimed that the ownership passed to Gage by the transfer and that he became liable for their pasturage thereafter. Gage claimed damages against Hunter for shortage in the number of cattle sold and sought to offset them against the claim of the interveners for the pasturage.

Rice & Bartlett, for appellants.—No agreement between said Hunter and Strayhorn-Hutton-Evans Commission Company without the concurrence of said Gage could affect his rights or the security held by him. No such judgment was rendered against defendant and his sureties as conditioned and contemplated by the terms of their bond.

The assignee of a judgment or cause of action takes its subject to all the equities subsisting between the original parties, including the right

of the debtor to offset against the claim of plaintiff, a claim arising out of the same transaction as the one in which judgment was rendered, whether the assignee had notice of the same or not. Dutton v. Mason, 21 Texas Civ. App., 393; 2 Black on Judgments, sec. 953; 2 Freeman on Judgments, sec. 420; Ellis v. Kerr, 11 Texas Civ. App., 348; Fleming v. Stansell, 13 Texas Civ. App., 560; Matthews v. Boydstun, 31 S. W. Rep., 817; Wright v. Treadwell, 14 Texas, 256; Chilstrom v. Eppinger, 78 Am. St. Rep. (note), 52; Fitzhugh v. McKinney, 43 Fed. Rep., 461; Simpkins Equity (set off), 515, 516; Castro v. Gentiley, 11 Texas, 28; North Chicago Rolling Mill Co. v. St. Louis Ore Co., 152 U. S., 615; United States Trust Co. v. Western C. Co., 81 Fed. Rep., 468, 90 Fed. Rep., 460.

The effect of the judgment is to leave defendant liable on the notes executed as a matter of accommodation to Hunter and held by third parties, and at the same time impairing the security afforded him by the mortgage on plaintiff's cattle.

Nat Lewellyn and *Z. I. Harlan,* for appellee.—All conflicts in evidence, if any, are resolved in favor of the correctness of the court's decision. Tabet v. Powell, 88 S. W. Rep., 273; Scott v. Woodard, 88 S. W. Rep., 407; Lauchheimer v. Coop, 86 S. W. Rep., 61; Mora v. Thomas, 86 S. W. Rep., 632; Gammell Book Co. v. Jones, 78 S. W. Rep., 21.

Other evidence amply sustains the judgment and it is not shown that the evidence complained of was considered by the court in making up his judgment. LaPice v. Caddenhead, 24 Texas Civ. App., 365; Smith v. Bunch, 73 S. W. Rep., 559; Greenway v. DeYoung, 79 S. W. Rep., 605; First Natl. Bank of Greenville v. Greenville Oil Co., 24 Texas Civ. App., 649.

Gage, as vendee, is estopped to question the consummation of the contract between Hunter and the commission company. Clegg v. Gee, 2 Texas App. C. C., 487, 488; Martin v. Rotan Groc. Co., 66 S. W. Rep., 312; Moore v. Steele, 67 Texas, 440.

EIDSON, ASSOCIATE JUSTICE.—This case was tried by the court below without a jury, and while there is a conflict in the testimony on the issue as to whether the cattle were sold to appellant and became his property or were simply bill-of-saled to him for Hunter's benefit and in order that his indebtedness to the Strayhorn-Hutton-Evans Commission Company might be extended, we are of opinion that the record shows sufficient evidence to support the finding and judgment of the court that said cattle were sold to appellant and became his property.

Appellant's bond provided as follows: "It is further expressly agreed and understood that in the event that plaintiff recovers judgment in either or both of said cases against the defendant Gage, with a foreclosure of such pasturage lien for the pasturage of the cattle now in said pasture, then for so much of said judgment or judgments as shall be decreed to be such lien on said cattle now in said pasture, a judgment may be rendered on this bond against the said J. H. Gage as principal, and the other subscribers hereto as sureties therein; it being intended that this bond shall take the place of the cattle now in said pasture and

stand in lieu thereof as security for the pasturage on the cattle now in said pasture, and for their respective pastures only." And the court found in favor of the interveners for the amount of the pasturage of the cattle in the sum of $929.50, and that said amount was a lien upon the cattle described in the two petitions, and that the said bond was executed in order to obtain the possession of and permission to remove the cattle upon which the lien was decreed. This authorized the judgment against the sureties on appellant's bond.

Appellant's claim for shortage in the cattle sold him, and for which he obtained judgment in the sum of $1,538.24 against Hunter did not arise out of and was not incident to or connected with the plaintiff's cause of action upon which this suit is based. The shortage in the number of cattle did not arise out of and was not in any manner incident to or connected with the pasturage of the cattle or appellant's implied obligation to pay the reasonable value of the pasturage. (Rev. Stat., art. 755; Carothers v. Thorp, 21 Texas, 362; Egery v. Power, 5 Texas, 501; Cannon v. Hemphill, 7 Texas, 184; Dutton v. Mason, 21 Texas Civ. App., 393.) And the court having found that the plaintiff C. T. Hunter, by written transfers and assignments filed since the institution of the suits, had assigned and transferred his entire cause of action in each of the suits to the interveners, and that the same was made for value and prior to the filing of the answer and plea of reconvention by appellant Gage, and there being evidence to support such findings, the said claim of appellant could not legally be off-set against the claim of interveners.

If the letters referred to in appellant's fourth assignment of error were improperly admitted in evidence, the case being tried before the court, and there being sufficient evidence independent of that afforded by the letters to support the judgment, and the plaintiff Hunter having, in effect, testified to the matters that these letters tend to prove, their admission was harmless.

The fact that the contract or agreement between Hunter and the Strayhorn-Hutton-Evans Commission Company was not completed or carried out as to that part thereof which required the latter to surrender to the former his notes, and the former to convey to the latter the land upon which they had a second mortgage, does not affect the validity of that part of the contract which was fully consummated, and the benefits of which were availed of by the said Strayhorn-Hutton-Evans Commission Company; and the fact that appellant was not a party to such contract would not in any manner affect the sale made to him of the cattle.

In our opinion there was sufficient testimony to support the finding and judgment of the court as to the amount of pasturage for which judgment was rendered.

As before stated, we are of opinion that the testimony was sufficient to support the finding of the court that the cattle, for the pasturage of which this suit was brought, were the property of appellant Gage; and therefore overrule his seventh assignment of error.

There being no reversible error pointed out in the record, the judgment of the court below is affirmed.

Affirmed.

B. J. BENEFIELD v. MARION COUNTY ET AL.

Decided May 16, 1906.

County Treasurer—Commissions.

B. being county treasurer, the county endeavored to issue bonds to pay off a judgment against it, but on account of such judgment the approval and registry of the bonds was refused by the State officers. The county then procured a bank to buy and cancel the judgment. B. was succeeded in the office by E., after which the bonds were issued and sold and the bank paid out of the proceeds. Held (1), that the facts supported a finding that the transaction constituted a purchase of the judgment by the bank, and not a loan by it to the county, and that B. was not entitled to commission on the sum paid, as on money received and paid out by him as treasurer. (2) The county not appealing from so much of the judgment as allowed a recovery of the commissions by E., B., as appellant could not complain of the judgment on the ground that E.'s claim had not been first presented to the Commissioners' Court.

Appeal from the District Court of Marion County. Tried below before Hon. P. A. Turner.

J. H. Benefield and *W. T. Armistead*, for appellant.—Appellant was entitled to commissions as treasurer on the amount paid to secure cancellation of the judgment. Presidio County v. Walker, 5 Texas Ct. Rep., 502.

The judgment of Erambert against the county was erroneous because his claim had not been submitted to the Commissioners' Court. Rev. Stats., art. 790; Leach v. Wilson County, 62 Texas, 331; Norwood v. Gonzales County, 79 Texas, 222.

R. R. Taylor, for appellees.—The county treasurer is only entitled to commissions on money received and paid out by him. Rev. Stats., art. 2467; Wharton County v. Ahlday, 84 Texas, 12; Baylor County v. Taylor, 3 Texas Civ. App., 523.

KEY, ASSOCIATE JUSTICE.—B. J. Benefield was county treasures of Marion County from 1898 until December 5, 1904, when he was succeeded by W. H. Erambert, Sr., who now holds the office. In June, 1904, Gustavus Remak, Jr., was the owner of a valid judgment against Marion County for $26,000. The county made a contract with Remak by which he agreed to accept $13,315 in satisfaction of his judgment. In order to raise funds with which to pay that and other debts, the County Commissioners' Court undertook to issue and sell bonds to the extent of $26,000. In order to accomplish that result, it was necessary to get the bonds approved by the Attorney General of the State and registered by the Secretary of State. Such approval and registration were refused on account of the Remak judgment; and, in order to remove that obstacle, a contract was entered into with the Rogers National Bank by which the bank paid Remak $13,315, and he transferred his judgment to the bank. This occurred on June 2, 1904, and on June 30, 1904, the bank executed a receipt to the county for $13,315, and also executed a formal cancellation of the Remak judgment. After this was done the bonds were approved by the Attorney General, registered by the Secretary

of State and delivered by the county to the bank; and in April, 1905, they were sold by the bank and the Commissioners' Court for $20,800. The bank retained $13,315 and paid the residue of the $20,800 to Erambert, the county treasurer.

Thereafter a dispute arose between Erambert and his predecessor Benefield as to which was entitled to the commissions allowed by law to the county treasurer for receiving and disbursing the $13,315; and the Commissioners' Court refused to pay the sum to either claimant. Thereupon Benefield, the former treasurer, brought this suit against the county and Erambert, the present treasurer.

Erambert answered denying the plaintiff's right to recover, and by cross action asking for judgment against the county for $330.37, the amount of the commission in controversy.

There was a non-jury trial resulting in a judgment for the defendant Erambert against the county for the commissions in dispute, and the plaintiff Benefield has appealed.

If the transaction between the county, Remak and the bank constituted a loan of $13,315 from the bank to the county, appellant, who was then county treasurer, is entitled to the commissions in controversy; but if the transaction was not in fact a loan, and the bank purchased and became the absolute owner of the Remak judgment, and paid Remak the $13,315, not as a loan to the county, but as a consideration for the sale of the judgment, then appellee Erambert is entitled to the commissions. If the transaction was a loan, the $13,315 paid to Remak on June 2, 1904, was money received, owned and paid out by the county, and the treasurer then in office was entitled to the commissions; but if that transaction was not a loan and the bank became the absolute owner by purchase of the Remak judgment, then the bank was merely substituted to Remak as a creditor of the county, and the Remak judgment was not in fact discharged until after the bonds were sold in April, 1905.

The trial judge filed no findings of fact, but we presume he reached the conclusion that the transaction referred to did not constitute a loan but a sale by which the bank was substituted for Remak as a creditor of the county, and there is testimony in the record to support that finding. Neither Remak nor any one connected with the bank gave testimony, and the only evidence bearing on the subject referred to was given by the county judge; and, while some of it tends to show that the transaction between the county and the bank was intended as a loan, he said: "Under these circumstances I called on the Rogers National Bank for help. It agreed to buy the judgment from Remak and pay him $13,315 in cash for it. Remak agreed to this, and on June 2, 1904, Gustavus Remak, Jr., sold and in writing transferred said judgment to the Rogers National Bank and the bank paid him in cash $13,315 for the same. The bank then became the owner of said judgment against the county."

The testimony quoted supports the finding that the transaction was not a loan but a purchase by the bank of the judgment.

This disposes of the controversy between Benefield and Erambert. The county has not appealed, and if it be true, as contended in appellant's brief, that Erambert was not entitled to judgment against the county because of his failure to present his claim to the Commissioners' Court before bringing suit be conceded, still no ground for reversal exists

because the county is not complaining. If Benefield is not entitled to recover, it is immaterial to him whether or not error was committed as between Erambert and the county.

No reversible error has been shown, and the judgment is affirmed.

Affirmed.

Texas & New Orleans Railway Company v. John McCraw.

Decided May 16, 1906.

1.—Assumed Risk—Negligence of Master.

A negligent act imputable to the master, and which can not be anticipated by the servant, is never the subject of assumed risk.

2.—Fellow Servant Act of 1897 Construed.

The removing of a handcar from the main track of a railway by the section gang in the performance of their duties, and the lifting and placing of the same back upon the track is an operating of the car within the meaning of the fellow servant act of 1897, and the company is liable for injuries sustained by one member of such gang caused by the negligence of other members.

3.—Charge—Double Damages.

A charge is defective, not necessarily because it suggests to the jury the various subjects or elements of damages they may consider, but where it mentions the subjects in such a way and in such a connection as is calculated to lead them to treat items that enter into the same subject as separate and distinct elements of damage.

Appeal from the District Court of Jefferson County. Tried below before Hon. W. H. Pope.

Baker, Botts, Parker & Garwood and *Chester & Chester,* for appellant. —Where a gang of men are working together, and one receives an injury through the acts or conduct of the others, the burden is on him to prove not only that he so received such injury, but also that such acts or conduct constitute negligence. Texas & N. O. R. R. Co. v. Crowder, 63 Texas, 506; Texas & N. O. R. R. Co. v. Crowder, 76 Texas, 501; Murray v. Gulf, C. & S. F. Ry. Co., 73 Texas, 2; St. Louis, A. & T. Ry. Co. v. Denny, 5 Texas Civ. App., 359; Gulf, C. & S. F. Ry. Co. v. Kizziah, 86 Texas, 89.

In a suit for damages, proof that those lifting a handcar with plaintiff suddenly ceased to support the weight, thereby increasing his burden and injuring him, without any explanation as to the cause thereof, does not establish negligence. Seery v. Gulf, C. & S. F. Ry. Co., 8 Texas Ct. Rep., 925; McCray v. Galveston, H. & S. A. Ry. Co., 89 Texas, 168; Trinity Co. Lumber Co. v. Denham, 85 Texas, 56; Broadway v. San Antonio Gas Co., 60 S. W. Rep., 270; Missouri, K. & T. Ry. Co. v. Crowder, 55 S. W. Rep., 380; Patton v. Texas & P. Ry. Co., 179 U. S., 658; Labatt's Master & Servant, secs. 833-837.

An injury to a member of a crew engaged in lifting a handcar, resulting from unexplained failure of two other members to support their portion of the weight, is an ordinary risk, assumed, for which the master is not liable. Seery v. Gulf, C. & S. F. Ry. Co., 8 Texas Ct. Rep., 925; San Antonio Trac. Co. v. DeRodriguez, 8 Texas Ct. Rep., 750.

A vice principal can not recover damages occasioned him by the negligence of a servant while engaged with such vice principal in the performance of an act under his immediate supervision, management or control. Sayles' Statutes, art. 4560g; Moore v. Jones, Recev'r, 15 Texas Civ. App., 391; Seery v. Gulf, C. & S. F. Ry., 8 Texas Ct. Rep., 927; Sweeney v. Gulf, C. & S. F. Ry., 84 Texas, 436; Missouri Pac. Ry. v. Williams, 75 Texas, 4; Ragsdale v. Memphis & C. Ry., 3 Baxter, 426 (59 Tenn.); Sher. & Red., sec. 241, p. 439.

The special charge is erroneous, because it assumes that the work appellee and others were engaged in, the lifting of a handcar to be carried to and placed on the track, constituted an "operation" of such within the meaning of the law. Long v. Chicago, R. I. & T. Ry. Co., 57 S. W. Rep., 803; Lawrence v. Texas Cent. Ry. Co., 61 S. W. Rep., 342; Lakey v. Texas & Pac. Ry. Co., 7 Texas Ct. Rep., 870.

A verdict for three thousand dollars in favor of a minor within a few days of his majority for a partial hernia received about two years previous where there has been but very little suffering, inconvenience or disability, and the evidence does not warrant a finding of future disability or lessened earning capacity, is excessive. Morrison v. Northern Pac. Ry., 33 Am. and Eng. Ry. Cases, N. S., 233.

When a party sustains an injury it is his duty to use care, prudence and diligence to minimize the effect and duration thereof. If he fails to do this he can not recover such damages flowing therefrom as he could have avoided by use of such care, prudence and diligence. Ft. Worth & D. C. Ry. Co. v. Daggett, 87 Texas, 327; Gulf, C. & S. F. Ry. Co. v. Coon, 69 Texas, 730; Western U. Tel. Co. v. Hoffman, 80 Texas, 422; City of Waxahachie v. Connor, 35 S. W. Rep., 692; Shear. Red. Neg., sec. 95; Beach Cont. Neg., sec. 69; Sutherland Dam., sec. 1255.

George D. Anderson and *Oswald S. Parker,* for appellee.—When it appears from the evidence that injury to plaintiff resulted directly and proximately from an act or omission on the part of another person or persons, and such act or omission is shown to be out of the ordinary and something that could not reasonably be anticipated at the time, and is shown to be such act or omission as, under the circumstances, was naturally calculated to injure plaintiff, the plaintiff has, under these circumstances, established a prima facie case of negligence, requiring some positive testimony to explain, justify or excuse. Missouri Pac. Ry. Co. v. Bond, 2 Texas Civ. App., 104; Schram v. Strouse, 28 S. W. Rep., 264; Gillum et ux v. New York & T. S. S. Co., 76 S. W. Rep., 234.

"The operation of the hand car was the operation of a railroad, in the sense of article 4560-f, Revised Statutes, 1895, the terms of which are decisive against the proposition between defendant" company and McCraw, that the question of liability could be in any wise affected by McCraw being either the vice-principal or the fellow servant of the negligent employes. Galveston, H. & S. A. Ry. Co. v. Perry, 85 S. W. Rep., 64: Gulf, C. & S. F. Ry. Co. v. Howard, 80 S. W. Rep., 229; Galloway v. San Antonio & G. Ry. Co., 78 S. W. Rep., 32.

The language of the statute in question, article 4560-f, is too explicit to allow of any construction.

The record in this case will not warrant this Appellate Court in de-

claring the verdict of the jury excessive in amount. Texas & N. O. Ry. Co. v. Lee, 74 S. W. Rep., 347; Missouri, K. & T. Ry. Co. of Texas v. Hannig, 41 S. W. Rep., 197.

The charge on the measure of damages was not misleading or confusing to the jury, nor did it tend to induce them to allow double damages. North Texas Traction Co. v. Yates, 88 S. W. Rep., 283; Gulf, C. & S. F. Ry. Co. v. Warner, 54 S. W. Rep., 1067; Gulf, C. & S. F. Ry. Co. v. Greenlee, 62 Texas, 351; Houston & G. N. R. R. Co. v. Randall, 50 Texas, 261.

JAMES, Associate Justice.—Appellee sued by next friend and alleged that on or about February 21, 1903, he was a member of a gang of men in defendant's employ, whose duties, among other things, required them to operate a handcar to and from work on the track. That about six o'clock on the evening of said date they had been at work about two miles west of Beaumont and in the performance of their duties it became necessary to replace the car on the track for the purpose of returning to the camp at Beaumont; that for this purpose plaintiff and the other servants composing the gang, took hold of the car which had been placed several feet away from the track, and lifting same up started to place it upon the track, but that after it was lifted certain of them suddenly and without warning to plaintiff negligently failed to sustain their share of the weight and allowed the strain of a large portion of the weight to come upon plaintiff, whereby he was seriously and permanently injured, which injury consisted of a rupture, whereby he has become unfit to follow his occupation as a laborer, and wholly unable to perform any manual labor without great pain and inconvenience and risk to his life and general health, etc. He asked for damages in the sum of $20,000. A verdict was returned for $3,000.

Defendant answered in substance: 1st, That the car was not being operated at the time, and the act complained of was that of plaintiff's fellow-servants; 2d, that it was a matter the risk of which was assumed; 3d, that plaintiff was foreman of this gang at the time; 4th, that plaintiff's injuries, if any, have been largely and materially contributed to by plaintiff by his failing to take proper care of himself and by taking violent and dangerous exercise for one in the condition he claims to have been in.

The only witness who testified to the circumstances of the occurrence, was the appellee. He testified that the car was lying with its end toward the track and there were three men on the far side. He was on the corner at the end next the track. The nearest end was four or five feet from the track. "Six of us picked the car up and made a step or two toward the track and the men on my side gave way and let the weight of the car on me. In fact they turned loose and of course I could not hold the weight of it and had to let go. When the weight came on me I felt something break loose on the inside. They gave no warning that they were going to turn loose. After that we picked the car up and carried it on the track. I knew the weight came on me and I had to let mine down and they didn't have hold of it."

The method of using the car was to take it out to the place of work and pick it up and remove it from the track out of the way of trains,

and it would be picked up and placed back on the track to return to camp or to go to where there was other work to do. It was an every day affair. It took six men to handle it in this way, and was a pretty good load for six men.

One John Collopy was foreman of the whole gang which consisted of about thirty-five or forty men, all Mexicans except plaintiff and the assistant foreman E. E. McCraw, and on that day Collopy had gone to Houston; E. E. McCraw had another gang at work elsewhere and there was testimony that appellee was in charge of this gang as foreman. Appellee denied this relation and testified that he was no other than a mere laborer like the others.

It is not necessary for us to go minutely into the testimony. We find there was evidence in plaintiff's testimony to fairly support the verdict, in that the two persons working at plaintiff's side in carrying the handcar back to the track appeared to have been negligent in releasing their hold, thereby suddenly and unexpectedly throwing excess of weight on plaintiff, causing him the injury complained of. There was evidence that would sustain such a finding, even after duly considering the circumstances cited by appellant to weaken the force and reliability of plaintiff's statement. It presented the issue of negligence sufficiently to make it necessary to be submitted to the jury. We might agree with appellant that if nothing had been disclosed but that additional weight was turned on plaintiff in the manual moving of the car, without some explanation of the manner by which this was occasioned, enough would not have appeared to prove negligence. But the fact that the two men lifting on the same side with plaintiff let go their hold at just that time tends to locate the act which threw the weight upon plaintiff, and shows it in the light of an act that was inconsistent with ordinary care. The case was allowed by defendant to go before the jury in this condition of the evidence. These remarks dispose also of the first proposition under the fifth assignment of error.

Under the second assignment appellant presents the following proposition: "An injury to a member of a crew engaged in lifting a handcar, resulting from unexplained failure of two members to support their portion of the weight is an ordinary risk assumed, for which the master is not liable." What has been said above is relevant to this proposition and disposes of it. A negligent act, that can not be anticipated by the injured party, is never the subject of assumed risk. The assignment under consideration is that the undisputed evidence shows that the injury resulted from a risk that was assumed by plaintiff, and we are unable after consideration of the evidence, to sustain it.

In connection with plaintiff's third assignment of error we shall state how the court submitted the case to the jury.

The court in the main charge assumed that the act in which this gang was engaged was in the course of the operation of the car, "if the jury found the defendant used in connection with the work, a handcar for the purpose of transporting plaintiff and others to and from their work and for the purpose of transporting tools and material used in connection with such work, and the handcar with which plaintiff was working was being so used and it became necessary to remove same from defendant's track and to replace same on defendant's track, and that the

plaintiff and the other employes with him were then engaged in replacing said handcar upon defendant's track, etc." In a special charge asked by plaintiff's counsel the jury were told that the fellow-servant Act of 1897 (quoting article 4560f Sayles Rev. Stats.) applied to this case, and that if plaintiff was injured as alleged while in the employ of defendant and while operating in conjunction with those with whom he was working, one of defendant's handcars, and that he was injured by the negligence of any other of the servants engaged at the time with him on the work of operating said handcar, then plaintiff could recover regardless of whether or not he was a fellow-servant with the other and regardless of whether or not he was foreman of the gang.

With this statement of the character of the charge we proceed to consider the propositions made by appellant under its third and eighth assignments.

Proposition 1: "A vice-principal can not recover damages occasioned him by the negligence of a servant while engaged with such vice-principal in the performance of an act under his immediate supervision, management and control." The merits of this proposition in a proper case, need not be dealt with here. If the court was right in holding that under the facts of this case the handcar was being operated within the meaning of said article, then the fact that plaintiff was foreman made no difference. This question has been considered by us in other cases. (Galveston, H. & S. A. Ry. v. Perry, 85 S. W. Rep., 64; Galloway v. San Antonio & G. Ry. Co., 78 S. W. Rep., 32.)

We are of opinion that the trial court was right in holding that the moving the handcar back to the track, in the prosecution of the work of the gang, was the operation by defendant of same. It is necessary in such work to remove and keep the car from the main track pending the work of the gang at a particular place. It is not practicable for switches to be placed so that the handcars can on such occasions be turned into them, instead of setting them down on the right of way. If this car had been removed from the track by running it out upon a switch, the act of running it back again along the switch would clearly have been operating it. This it seems to us could not be questioned. We can perceive no real difference where its removal and restoration to the track is effected by carrying it off and carrying it back again.

There was no dispute in the evidence as to the removal of the car from the track and as to its being lifted and carried back to the track, and that the injury, if any, occurred during the act of carrying it back and during the prosecution of the work in the regular manner. The court had the right to assume and so inform the jury that the car was being operated in the sense of the statute, and the charge left for the jury's determination the issue of negligence. Therefore the other propositions under these assignments are not sustained. This applies also to the second proposition under the fifth assignment.

We need not consider the fourth assignment insofar as it insists that the verdict is excessive in view of a reversal on another ground. One proposition under the assignment is based upon the idea expressed in the following part of it: "Because the undisputed evidence shows that plaintiff by his own contributory negligence in failing to have himself operated upon as he was advised by his physician to do and use proper

precaution and care in his conduct, work and movements, has prolonged and materially increased the result of his alleged injury." We can not declare from the amount of the verdict that the jury did not give due effect to all testimony bearing on that subject. Defendant requested and the court gave the following special instruction on the subject: "You are charged that if plaintiff received any injuries it was his duty to have taken such care of himself and procured for himself such medical treatment, if any was necessary, as a person of ordinary care and prudence would have done under the same or similar circumstances, and if you believe from the evidence that he sustained any injuries at the time and place alleged by him, and that same were received under such circumstances as to render the defendant liable therefor under the other instructions given you, yet if you further believe from the evidence that plaintiff failed to use ordinary care in taking care of himself thereafter or to secure medical treatment for himself, if any was necessary, then you are instructed that plaintiff could not recover of defendant for any such damage or suffering, if any, he sustained by reason of such failure on his part."

On the measure of damages the court gave the following charges: "If you determine that plaintiff was injured substantially as alleged by him, and if you find for the plaintiff, then you may consider the nature, extent and duration of such injury, and whether or not plaintiff has suffered physical or mental pain, and whether or not he will hereafter so suffer, as a result of such injuries; and you may also consider whether or not plaintiff's earning capacity, after he reaches the age of twenty-one years, will be diminished by reason of such injuries, and you may consider whether or not such injuries will result in inconvenience, or risk to plaintiff's general health or life; and having considered these matters, you will render your verdict for such a sum of money as in your conscientious judgment will fairly compensate plaintiff for such injuries."

Defendant's special charge No. 2. "You are charged that if plaintiff received any injuries it was his duty to have taken such care of himself and procured for himself such medical treatment if any was necessary as a person of ordinary care and prudence would have done under the same or similar circumstances, and if you believe from the evidence that he sustained any injuries at the time and place alleged by him, and that same were received under such circumstances as to render the defendant liable therefor under the other instructions given you, yet if you further believe from the evidence that plaintiff failed to use ordinary care in taking care of himself thereafter or to secure medical treatment for himself if any was necessary then you are instructed that plaintiff could not recover of defendant for any such damage or suffering if any he sustained by reason of such failure on his part."

Appellant complains of the first of these charges, it occurring in the main charge. One objection is that it and the above special charge are inconsistent and contradictory. We do not so regard them. It is true that the paragraph in the main charge makes no reference to a diminution of recovery by reason of plaintiff's conduct in failing to have himself treated or to take proper care of himself. Defendant evidently asked the special instruction to remedy this omission. And we do not see

how the jury could have failed to so understand it. It refers to the other instructions given and in effect tells the jury that notwithstanding such other charges, plaintiff could not recover of defendant for any damage or suffering which was attributable to such failure on his part.

The criticism which appellant directs to the first of the above charges is that it is misleading and confusing and tended to induce the jury to allow double damages. This presents a serious question.

In the case of International & G. N. Ry. v. Butcher, 98 Texas, 462, a charge on this subject authorized the jury to assess damages that would fairly compensate Butcher for the physical and mental suffering past and future, *and* the probable effect of the injuries upon his health mental and physical, *and* any impairment of his ability to pursue the course of life he might have done but for the injuries, *and* his probable decreased mental and physical capacity to labor and earn money. The italics are ours. There is a difference between that case and this in that here the jury were not in terms instructed to find for plaintiff in respect to the different subjects, as they were in that one.

We observe the same difference between this charge and the one given in the case of Railway v. Perry, which was as follows: "If you find for plaintiff you will say so by your verdict and assess the damages at such sum as from all the evidence will, in your sound judgment fairly compensate plaintiff for impairment of his general health, *and* for the physical injury he has suffered, *and* for such physical and mental suffering as resulted therefrom, *and* for the expenses for which he had become liable for medical treatment, and for the reduction and impairment of his ability to earn a living in the future."

In the above opinions the court, however, does not lay stress on the fact that the charges then under consideration directed the jury to find for plaintiff for the items enumerated. It is evident that it was considered sufficient to condemn the charges that they admitted of the jury finding separately for the various items mentioned for them to consider, whereby they might have found damages twice for the same thing.

In the case of Missouri, K. & T. Ry. v. Nesbit, 13 Texas Ct. Rep., 656, the charge was: "You are instructed that in the event you find in favor of the plaintiff, in estimating the compensatory damages to which he is entitled you may take into consideration and award him such a sum of money as will fairly compensate him for the physical and mental suffering which he has suffered or may suffer in the future, and the diminished capacity if any, to earn money and pursue the course of life which he might otherwise have done." This the Court of Civil Appeals at Galveston went so far as to hold submitted as distinct elements of damages, and diminished capacity to pursue the course of life which plaintiff might otherwise have pursued, and what was involved in the same thing, diminished capacity to earn money thus authorizing the assessment of damages twice for the same thing. While we may doubt that a jury could have been misled into giving that construction to the charge as it was worded the case serves to illustrate the necessity of extreme caution in the preparation of charges on the measure of damages in this class of cases to avoid the appearance of inviting double damages.

The rule applied by the Supreme Court in the Butcher and Nesbit

cases, is understood to be that a charge is defective, not necessarily because it suggests to the jury the various subjects or elements of damages they may consider, but where it mentions the subjects in such a way and in such a connection as is calculated to lead them to treat items that enter into the same subject, as separate and distinct elements of damage.

There could be no objection to a charge which authorizes recovery for physical suffering, which in the same connection properly presents and explains the different matters which would come under that head for consideration. So also with mental suffering, or diminished earning capacity. But when these matters are presented in such a way as to appear to treat them as distinct and independent items of damage, the charge is objectionable. As said in a Kentucky case, Southern Cov. & C. Ry. v. Nelson, 89 S. W. Rep., 202, the court passing upon a charge: "It directed the jury in estimating plaintiff's damages to segregate such of his injuries as ought to have been considered and estimated under the heads of physical and mental suffering and the permanent impairment of his ability to earn money, into special items of damage and allowed them to estimate the damages for each item as distinguished from the others and from the damages on account of physical and mental suffering or permanent disability." Applying this rule to the charge in question it is open to the criticism made.

It charged the jury to consider physical and mental pain suffered or to be suffered, and the effect of the injuries on plaintiff's earning capacity after he should have reached the age of 21 years. So far no defect in the charge is detected. It proceeds: "And you may consider whether or not such injuries will result in inconvenience, or risk to plaintiff's general health or life." "Inconvenience" would imply what is incident to physical discomfort. It is something that results naturally from physical pain and doubtless also from mental suffering. "Risk to plaintiff's general health or life" is a somewhat vague expression. If it means concern or apprehension from the dangers of sickness or death, as it was likely to be taken, it would be included in mental suffering consequent upon the injuries.

There was no error in the instruction referred to by the eighth assignment. Nor do we regard as error what is presented by the ninth assignment.

Reversed and remanded.

BAY CITY IRON WORKS v. REEVES AND COMPANY.

Decided May 16, 1906.

1.—Venue—"Local Agent" Defined.

By agent or representative as used in section 25 of art. 1194, of the Revised Statutes, is meant a fixed or permanent agency in the county in which the suit is instituted; and by the term "local agent" used in article 1223 is meant one who serves his principal in a certain, fixed locality. An attorney at law is not such agent.

2.—Same—"Accrued" Defined.

The word "accrued," as used in the statute, means "arose," and suit may be brought in the county in which the cause of action or a part thereof began

to have a legal existence. Facts considered, and held, that the court erred in dismissing plaintiff's suit.

Appeal from the District Court of Matagorda. Tried before Hon. Wells Thompson.

Gaines & Corbett, for appellant.—A foreign private corporation not incorporated by the laws of this State, may be sued in any county where such company may have an agency or representative. Rev. Stats, art. 1194, subd. 25; art. 1223; Pacific Mut. Life Insurance Co. v. Williams, 79 Texas, 633.

A foreign corporation not incorporated by the laws of this State, but doing business in this State, may be sued in any county where the cause of action, or a part thereof, accrued.

A cause of action is made up of the contract and the breach of it. Rev. Stats., art. 1194, pars. 5 and 25; Westinghouse Electric & Mfg. Co. v. Troell, 70 S. W. Rep., 324; Darragh et al. v. O'Conner et al., 69 S. W. Rep., 645; Western Wool Commission Co. v. Hart, 20 S. W. Rep., 131; Houston & T. C. Ry. v. Hill, 63 Texas, 383; Equitable Mortgage Co. v. Weddington, 2 Texas Civ. App., 375; Phillio v. Blythe, 12 Texas, 124.

Where a suit is for the foreclosure of mortgage or other lien, same may be brought in the county in which the property subject to such lien, or a portion thereof, may be situated.

Suits for the recovery of rents may be brought in the county in which the rented premises, or a part thereof, are situated.

Where a court has jurisdiction over a part of the subject matter of litigation, in order to avoid a multiplicity of suits, it is proper to embrace any other matters in controversy between the parties. Rev. Stats., art. 1149, subd. 12; Rev. Stats., art. 1585, subd. 5; Heidenheimer v. Allen, 1 White & W., p. 743, sec. 1281; Middlebrook v. Bradley Mfg. Co., 86 Texas, 706; Wilson v. Pecos & N. T. R. Co., 58 S. W. Rep., 183; Foster v. Gulf, C. & S. F. Ry. Co., 91 Texas, 631; McKaughan v. Kellett-Chatham Co., 67 S. W. Rep., 908.

The appearance of the appellant for the purpose of objecting to the jurisdiction of the court operated as an appearance to the next succeeding term of the court.

The filing of an answer to the merits before the disposition of the plea of personal privilege, is a waiver of such plea, and operates as an appearance.

The appearance of the defendant invoking the court's decision upon any question involved, constitutes an appearance and waives the necessity for service. Rev. Stats., art. 1242; York v. State, 73 Texas, 655; Aetna Life Ins. Co. v. Hanna, 81 Texas, 487; Westinghouse, E. & M. Co. v. Troell, 30 Texas Civ. App., 200; Pace v. Potter, 20 S. W. Rep., 929; Evans v. Breneman, 46 S. W. Rep., 80.

Claude Nowlin and *Linn, Holland & Austin,* for appellee.—That the judgment of the District Court, sustaining the plea of privilege and dismissing the suit, was correct, because Claude Nowlin, defendant's attorney, was not such a local agent as the statute contemplates, cited: St. Louis & S. F. Ry. v. Trawick, 84 Texas, 67, 68; Red River, S. &

W. Ry. v. Blount, 3 Texas Civ. App., 289; Mutual Life Insurance Co. v. Nichols, 24 S. W. Rep., 911; Gulf, B. & K. C. Ry. v. Texas & N. O. Ry., 64 S. W. Rep., 692; Sharp v. Damon Mound Oil Co., 72 S. W. Rep., 1043; Lindheim v. Muschamp, 72 Texas, 33; Cohen v. Munson, 59 Texas, 237.

That the judgment of dismissal was correct, because the contract nor any part of the same accrued, nor was the same to be performed in Matagorda County, cited: Houston & T. C. Ry. v. Hill, 63 Texas, 383; Westinghouse Electric Co. v. Troell, 30 Texas Civ. App., 200; Equitable Mortgage Co. v. Widdington, 2 Texas Civ. App., 375; Merchants' Oil Co. v. Seeligson, 15 S. W. Rep., 712; St. Louis, S. F. Ry. v. Trawick, 84 Texas, 67, 68; Sharp v. Damon Mound Oil Co., 72 S. W. Rep., 1043; Western Wool Commission Co. v. Hart, 20 S. W. Rep., 132; Cyc., vol. 9-265; Gentry v. Gallin, 14 Texas Civ. App., 422; Summers v. Mills, 21 Texas, 87; Good v. Caldwell, 11 Texas Civ. App., 515.

The action of the court in hearing and sustaining defendant's plea of privilege was correct for the reason that defendant filed its pleas and answers in due order separately at the same time and on the same day; and the plea in abatement (privilege) going to the jurisdiction of the court over the person of the defendant is the first plea and in due order of pleading in the courts of this State. If it was not, it was filed in due time and defendant could not be deprived of a hearing thereon and judgment by the court on the issues raised thereby. It was filed and heard at the first term and prior to any other pleas and answers. St. Louis, A. & T. Ry. v. Whitley, 77 Texas, 130; Equitable Mortgage Co. v. Weddington, 2 Texas Civ. App., 373; Texas & Pac. Ry. v. Childs, 40 S. W. Rep., 42.

That defendant's plea of privilege was filed in due order. Rev. Stats., art. 1262; St. Louis, A. & T. Ry. v. Whitley, 77 Texas, 130; Equitable Mortgage Co. v. Weddington, 2 Texas Civ. App., 372; Texas & Pac. Ry. v. Childs, 40 S. W. Rep., 42; Fairbanks & Co. v. Blum, 2 Texas Civ. App., 482; Pegram v. Owens, 64 Texas, 476; Rev. Stats., art. 1194, subd. 25.

FLY, ASSOCIATE JUSTICE.—Appellant sued appellee to recover commissions on the sales of machinery and rent for a warehouse and it was alleged that appellant was a private corporation chartered under the laws of Texas and that appellee was a corporation incorporated under the laws of the State of Indiana; that appellee had an agent in Texas residing at Dallas, Texas, and an agent who was temporarily in Bay City, Matagorda County, Texas. The suit was alleged to be based on a contract in writing by the terms of which appellant was to handle certain machinery in Matagorda County, and was to receive as compensation commissions on the amounts of gross sales as stated therein. It was further alleged that a contract had been made for the erection of a warehouse, on lots owned by appellant in Bay City, to be used for storing appellee's machinery, which was to be paid for by appellant in installments, the last in November, 1904, and that the building was to be turned over and was turned over to appellant at that time, and that after that day appellant charged ten dollars a month for storage and claimed a landlord's lien on appellee's property therein for the rents. Appellee filed

its plea of privilege to be sued in Dallas County, Texas, which was heard by the court, on the evidence, and judgment rendered sustaining the plea.

The service of citation was made on Claud Nowlin, an attorney at law, who represented appellee, and who was in Matagorda County at the time the citation was served on him for the purpose alone of settling certain litigation and conflicting claims between the parties to this suit. He had never acted as agent for appellee in the sale of its machinery in Matagorda County, or anywhere else, except in a foreclosure suit where he posted notices of sale of certain machinery and signed the same as agent of appellee.

In article 1223, Revised Statutes, it is provided upon whom citation must be served in the case of foreign corporations, among those mentioned being the local agent. By "local agent," as used in the article mentioned must be meant a person who is representing the corporation in the promotion of the business for which it was incorporated, and it was not contemplated that service could be had upon an attorney employed to adjust its claims, or for that matter, to an attorney employed to go to any part of the State to represent it in the settlement of claims to foreclose liens or perform other services not directly connected with the purposes of its organization. Under the construction of the statute contended for by appellant, a corporation could be cited through service on the regularly employed attorney of such corporation either in the county in which the attorney resided or in any county into which he might go to represent the interests of his client. The law evidently contemplates service on a person employed in forwarding the particular line of business for which the corporation was organized, and not every person who may be employed in any capacity by it. Under the theory of appellant a corporation, foreign or domestic, that is engaged in the sale of merchandise, could be sued in any county in the State into which its agents might travel to solicit patronage, and service could be obtained on the corporation by service on the agent or "drummer." By agency or representative, as used in section 25 of article 1194, is meant a fixed or permanent agency in the county in which the suit is instituted, and by the term "local agent" used in article 1223, is meant one who serves his principal in a certain fixed locality.

Subdivision 25, of article 1194, Revised Statutes, is an exception to the general rule, that no person, an inhabitant of this State shall be sued out of the county in which he has his domicile, and has reference to foreign corporations, joint-stock companies or associations alone, and has provisions peculiar to those corporations. In that section it is provided that the foreign corporations, joint-stock companies or associations "may be sued where the cause of action or a part thereof accrued, or in any county where such company may have an agency or representative, or in the county in which the principal office of such company may be situated; or when the defendant corporation has no agent or representative in the State, then in the county where the plaintiffs or either of them reside." Appellee had an agent in Texas and had an office in Dallas, Texas, but had no agency or representative, within the meaning of the statute in Matagorda County, and yet if the "cause of action or a

part thereof accrued" in that county the District Court erred in sustaining the plea of privilege and dismissing the suit. The word "accrued," as used in the statute, can have but one meaning and that is "arose," and if the cause of action arose or began to have a legal existence in Matagorda County the suit should not have been dismissed. To ascertain this fact an examination of the facts becomes necessary.

The contract was made and entered into in Matagorda County, between appellant and a representative of appellee. By the terms of that contract appellee agreed to furnish machines to appellant, which it agreed to sell in consideration of the payment of certain commissions by appellee. The contract confined the right to sell to Bay City and vicinity in Matagorda County. The machines were to be ordered and the freight on them paid by appellant. Everything in connection with the performance of the contract was to be done by appellant in Matagorda County, Texas. Under the construction, placed by the courts of this State, on the words "where the cause of action or a part thereof accrued" the District Court of Matagorda County clearly had jurisdiction of the cause of action. (Phillio v. Blythe, 12 Texas, 124; Houston & T. C. Ry. v. Hill, 63 Texas, 383; Western Wool Commission Co. v. Hart (Texas Sup.), 20 S. W. Rep., 131; Equitable Mortgage Co. v. Weddington, 2 Texas Civ. App., 373; Westinghouse Co. v. Troell, 30 Texas Civ. App., 200.)

In the case last cited this court, speaking through Justice Neill, held: "A cause of action is made up of the contract and the breach of it. It takes these two parts, at least, in this and like cases, to constitute the whole cause, within the meaning of the statute quoted, otherwise the added phrase 'or a part thereof' would be without meaning. . . . The contract having been made and entered into between the parties in Guadalupe County (for its approval by an executive office of the company in Pennsylvania related to the time and place it was made, and was only a ratification of it), we must hold, under the authorities cited, that a part thereof accrued or arose in that county, and that appellant's plea of privilege of being sued in the county of the residence of its agent was properly overruled." Appellee attempts, but fails, to differentiate that case from this. The facts are very similar, and the foreign corporation did not have an agent in Guadalupe County, as stated by appellee, but it distinctly appeared that there was but one agent and that he resided in Travis County. Neither is this a suit upon the vouchers given to appellant, but the petition declares upon the contract, the vouchers being evidence merely of the sums due by appellee under the contract.

The facts in the case of Mortgage Co. v. Weddington, herein cited, are similar to the facts in this case. Appellant and appellees had an agreement by which the latter were to procure loans for the former on real estate in Clay County, Texas, and were to receive certain commissions. Appellant was a foreign corporation with its principal office in Dallas County, and interposed a plea of privilege to be sued in that county. The court said: "By the terms of the contract these loans were to be secured upon lands situated in Clay County. Appellees resided in Clay County, and it was contemplated that at least the greater part of their work would be done in that county. They were employed because they lived in that county, and were expected to solicit loans there. Ap-

pellant, by the terms of the contract, was to send its agent to Clay County to examine and pass upon the value of the lands upon which the loans were to be secured. Under such a contract, for a breach thereof we believe that the cause of action should be held to have arisen, at least in part, in Clay County within the meaning of our statute."

If, as alleged by appellant, appellee owed it for rent of a house in Bay City, the rent was payable in that place and that allegation would give jurisdiction. It may be stated, however, that it appears from the terms of the contract that no rent could have been due by appellee to appellant at that time.

It is urged by appellant that the filing of an answer to the merits, gave the court jurisdiction even though it had none before, and there is authority to that effect, but as we hold that the venue was properly in Matagorda County, that question need not be considered.

The record fails to indicate that the lower court took any action on the motion made by appellant to consolidate this cause with one instituted by appellee against appellant on the same contract. We can not anticipate that the trial court will refuse to consolidate the two suits when it acts upon the motion.

Because the court erred in sustaining the plea of privilege and in dismissing the suit, judgment is reversed and the cause remanded.

Reversed and remanded.

BELLE W. COCHRAN ET AL. V. W. B. COCHRAN, EXECUTOR, ET AL.

Decided May 17, 1906.

1.—Will—Construction—Life Estate.

A testatrix provided by her will as follows: "I want what I have to be equally divided between my five children, namely: V. E. C., M. F. C., W. B. C., B. F. B. C., L. L. C. I want L. L. C. to give bond for the amount he gets. I want his part for him for his life, and at his death, if he dies without lawful children, I want his part paid to my two grandchildren, B. W. C., W. C., D. J. C.'s children." Held, said will gave to L. L. C. only a life interest in one-fifth of said estate, with remainder to the grandchildren named.

2.—Same—Adopted Heir.

L. L. C. died without children. After the death of the testatrix he adopted a minor as his heir. Held, the adoption of such minor could not defeat the devise in remainder to the grandchildren under the terms of said will.

3.—Debts Due by Life Tenant—Remainderman.

The one-fifth interest in the estate devised to the grandchildren in remainder could not be charged with the debts due by the life tenant to the testatrix. A remainderman takes directly from the testator, and not through the life tenant.

Appeal from the District Court of Fort Bend County. Tried below before Wells Thompson.

Spencer C. Russell and *L. M. Williamson,* for appellants Belle W. and Willie D. Cochran and S. C. Russell and L. M. Williamson.—A remainderman takes by purchase from the testator, and not by inheritance from the life tenant, and therefore neither he nor his remainder

is subject to the debts of the life tenant. Clift v. Clift, 72 Texas, 147; Armistead v. Armistead, 61 S. W. Rep., 1071; Bates v. Rider, 44 S. W. Rep., 666; 24 Am. & Eng. Ency. Law (2d ed.), 384-392.

The will left a life estate to L. L. Cochran with contingent remainder over to appellants, the contingency being that L. L. Cochran should die without lawful children. He so died, and the remainder thereupon became vested in appellants. Chace v. Gregg, 88 Texas, 558; Morris v. Eddins, 44 S. W. Rep., 203.

While it may be that where one paragraph of a will gives an absolute estate, a succeeding repugnant paragraph will be disregarded, nevertheless all parts of a will are to be construed together, and if upon the whole it appears that the testator intended the devisee to take merely a life estate this intention will be given effect, though another clause standing alone, might convey the idea that an absolute estate was intended. McMurry v. Stanley, 69 Texas, 228; Dulin v. Moore, 6 Texas Ct. Rep., 41; Chace v. Gregg, 88 Texas, 558; Morris v. Eddins, 44 S. W. Rep., 203; Hancock v. Butler, 21 Texas, 805.

W. B. Cochran and *Hutcheson, Campbell & Hutcheson,* for appellee. —The intention of the testator must be ascertained and followed in construing a will. Lake v. Copeland, 82 Texas, 464; Oxsheer v. Nave, 90 Texas, 573; Dial v. Dial, 21 Texas, 534; Cleveland v. Cleveland, 89 Texas, 445.

All parts of a will must be looked to in order to ascertain the intention of the testator. Lake v. Copeland, 82 Texas, 467; Faulk v. Dashiell, 62 Texas, 652; Vardeman v. Lawson, 17 Texas, 18.

The intention of the testator must be ascertained from the meaning of the words used in the instrument and these words alone. Hunt v. White, 24 Texas, 652; Peet v. Commerce St. Ry. Co., 70 Texas, 527.

The intention of a testator will not be defeated merely because he has not clothed his ideas in technical language. Bell v. Alexander, 22 Texas, 357.

The general rule is that a legacy by a creditor to his debtor does not operate as a release or extinguishment of the debt, unless it appears to have been the intention of the testator that it should so operate. The rule is the same whether the debt arose before or after the execution of the will. 18 Am. & Eng. Ency. of Law, 2d ed., p. 777 and notes.

In order to have a legacy by a creditor to a debtor operate as a release of a debt owing by the legatee to the testator, such intention on the part of the testator must be clearly and affirmatively proven. 18 Am. & Eng. Ency. of Law, 2d ed., p. 777 and notes.

None of the charges against L. L. Cochran are affected by the statutes of limitation; the settlement and division of the estate is one in equity. Oxsheer v. Nave, 40 S. W. Rep., 9.

PLEASANTS, ASSOCIATE JUSTICE.—This suit was brought by W. B. Cochran, executor of the will of Mrs. C. E. Cochran, deceased, for the construction of the will and the partition of the property therein bequeathed. The beneficiaries named in the will who were living, and the heirs of those who had died subsequent to the death of the testator were made parties defendant.

The facts disclosed by the evidence are as follows: On October 15, 1895, Mrs. C. E. Cochran executed a will in which she disposed of her property in the following manner:

"As life is uncertain and death is sure I feel it my duty as well as a privilege to write what I want done with what I leave, money or land, or stock of any kind. I want what I have to be equally divided between my five children, namely: Virgil E. Cochran, Mary Fanny Cain, William Bannister Cochran, Benjamin F. B. Cochran, L. L. Cochran. I want Loneous L. Cochran to give bond for the amount he gets. I want his part for him for his life, and at his death, if he dies without lawful children, I want his part paid to my two grandchildren, Belle W. Cochran, Willie Cochran, D. J. Cochran's children."

After the execution of this will L. L. Cochran became indebted to his mother at various times and in various amounts, the aggregate of such indebtedness remaining unpaid at the death of Mrs. Cochran being $2,079.

Mrs. Cochran died in August, 1901, and the will above mentioned was thereafter duly probated in the County Court of Fort Bend County. W. B. Cochran was named in the will as executor, and had qualified as such before bringing this suit.

L. L. Cochran died in August, 1903, leaving a will which has been duly probated, and by which all of his estate was devised to his wife, Zora Cochran. He died without issue, no children having ever been born to him. After the death of his mother he and his wife, Zora Cochran, adopted as their heir a minor named Fred Cochran, who was one of the defendants in the court below.

The defendants Belle W. and Willie D. Cochran answered claiming as remaindermen one-fifth of the entire estate free from the debts of L. L. Cochran, the life tenant.

The firm of Russell & Williamson intervened in the suit claiming by purchase an undivided one-fourth of the interest of Belle and Willie Cochran in the estate, and asking that their interest be protected by the judgment.

Mrs. Zora Cochran answered and asserted title to the one-fifth interest in the estate devised by the will to L. L. Cochran. She also pleaded the statute of limitations in bar of the claims asserted against her testator, L. L. Cochran.

Fred Cochran, by his guardian *ad litem*, filed an answer adopting as his own the answer of Mrs. Zora Cochran.

The court below held that the defendants Belle and Willie Cochran were entitled under the terms of the will to a one-fifth interest in the estate, but that such interest should be charged with the debt due the estate by L. L. Cochran. Each of the four remaining children of Mrs. Cochran named in the will were decreed to be entitled to one-fifth of the estate, and each was charged with the amounts due by him to the estate. The interest of the interveners in the portion of the estate decreed to Belle and Willie Cochran was established. Mrs. Zora Cochran and the minor, Fred Cochran, were adjudged to have no interest in the estate. All of the property of the estate was ordered partitioned in accordance with the terms of the decree as above indicated, and commissioners of partition were appointed.

Belle and Willie Cochran and Russell & Williamson have appealed jointly from this judgment.

Mrs. Zora Cochran has also appealed, her appeal being against all of the other parties to the judgment.

We will first dispose of the questions presented by the brief of Mrs. Zora Cochran. Her contentions are:

1. That the will of Mrs. C. E. Cochran bequeathed to L. L. Cochran in fee a one-fifth interest in the estate of the testator, and the subsequent provision of the will directing that he give bond for his portion, and declaring that she wants his part for him for life, and at his death, if he dies without lawful children, she wants it paid to her grandchildren, Belle and Willie Cochran, are too indefinite and uncertain to reduce the estate in fee, given him in the previous clause of the will, to a life estate.

2. That under the express terms of the will, the estate bequeathed L. L. Cochran would revert to Belle and Willie Cochran only in event he died without lawful children, and the adoption by him of the minor, Fred Cochran, as his heir, constituted said minor a lawful child of L. L. Cochran as that term is used in the will, and therefore the contingency, which by the terms of the will would defeat the estate in remainder, occurred, and L. L. Cochran took a fee simple estate in the devised property.

She further contends that, in any event, she was entitled, as the sole devisee of L. L. Cochran, to one-fifth of all the net income of the estate which accrued after the death of Mrs. C. E. Cochran, and that her interest in such income could not be offset by debts due the estate by L. L. Cochran which were barred at the time this suit was brought.

We can not agree to the soundness of either the first or second of these contentions. While the language used by Mrs. C. E. Cochran to express her desires as to the disposition of her property is not well chosen, we think, when the paragraph of the will above set out is considered in its entirety, that it was clearly her intention to give L. L. Cochran only a life interest in one-fifth of her estate, with remainder to her grandchildren, Belle and Willie Cochran, in event L. L. Cochran died without lawful issue. The statement that she desires her estate to be equally divided between her five named children, if standing alone, would be construed to vest a fee simple interest to an equal one-fifth of the estate in each of said children; but when this statement is immediately followed by the expressions, "I want L. L. Cochran (one of the five children just previously named) to give bond for the amount he gets. I want his part for him for life, and at his death, if he dies without lawful children, I want his part paid to my two grandchildren, Belle W. Cochran and Willie Cochran," she makes plain her intention that L. L. Cochran is to have only a life estate in an equal one-fifth of her property, and if he dies without lawful children said one-fifth part of her property is to go to the appellants Belle and Willie Cochran. We think it equally clear that she did not intend that the estate in remainder devised to her grandchildren could be defeated by the adoption by L. L. Cochran of an heir. While it is true, as said by Judge Key in McColpin v. McColpin, 8 Texas Ct. Rep., 548, that adoption under our statutes entitles the person adopted to inherit at law as a child

of the adopter, an adopted heir is not in fact the child of the person adopting him, and a devise to the child or children of a named person could not be construed to be a devise to the adopted heir of such person.

The correctness of the third contention of appellant Zora Cochran insofar as it states a proposition of law need not be passed upon. The record shows that there is indebtedness due Mrs. C. E. Cochran's estate by L. L. Cochran not affected by the plea of limitation sufficient in amount to offset one-fifth of the net income of said estate which has accrued since the death of the testator, and therefore the legal questions involved in this contention become abstract.

If our conclusion that under the will of Mrs. Cochran, L. L. Cochran took only a life estate with remainder to appellants Belle and Willie Cochran is correct, it necessarily follows that the debts due the estate by L. L. Cochran are not a charge upon the corpus of the one-fifth of the property devised to him for life. The remainderman takes directly from the testator, and not as heir of the life tenant, and his estate can not be charged with the debts of the life tenant.

We do not understand appellees to question the soundness of the proposition last stated, but their contention is that the one-fifth of the estate devised to L. L. Cochran for life, and at his death to Belle and Willie Cochran, is one-fifth of the property of the testator less the amount due by L. L. Cochran to the estate. In support of this contention they quote the general rule that a legacy by a creditor to his debtor does not operate as a release or extinguishment of the debt unless it clearly appears to have been the intention of the testator that it should so operate.

This rule is manifestly not applicable to the question under consideration, that question is not whether the estate devised to L. L. Cochran should be charged with his debts, but what estate was devised to him, and what portion of the testator's property she intended should pass by the will to her grandchildren, Belle and Willie Cochran.

We think the will, construed as a whole, shows that she intended that her estate should be divided into five equal parts and one of these parts should go to L. L. Cochran for life, with remainder to the grandchildren above named. It is true that she directs that her estate shall be divided equally among her five children, but she follows this with the statement that the part given to L. L. Cochran is for life only, thus showing that the equality which she had in mind was the division of the property into five equal parts and not an equality in the value of the estate devised to each of the five named children.

The cases of Lake v. Copeland, 82 Texas, 464; Oxsheer v. Nave, 90 Texas, 573; Faulk v. Dashiell, 62 Texas, 652; Peet v. Commerce St. Ry. Co., 70 Texas, 527; and others cited by appellees, all recognize the rule that the intention of the testator must be ascertained from the will as a whole, the language used to be interpreted in the light of circumstances existing at the time the will was executed, and when so ascertained such intention must control in the construction of the will.

Applying this rule in the construction of the will under consideration, as before stated, we think it clear that Mrs. Cochran intended that L. L. Cochran should have only a life estate in one-fifth of the property owned by her at the time of her death, and that in event he died without children

said one-fifth of her property should revert to the two grandchildren, appellants herein. Under this construction of the will it necessarily follows that the corpus of the property devised to appellants in remainder can not be charged with the debts of the life tenant, and the trial court erred in not so holding.

That portion of the judgment of the court below holding that the one-fifth of the estate devised to L. L. Cochran for life should be charged with the debts due by him to the estate, is reversed, and judgment is here rendered in favor of the appellants, Belle and Willie Cochran and Russell & Williamson for one-fifth of the estate free from the debts of L. L. Cochran.

In all other respects the judgment of the court below is affirmed.

Reversed and rendered in part.
Affirmed in part.

CHICAGO, ROCK ISLAND & GULF RAILWAY COMPANY v. W. C. GRONER ET AL.

Decided May 19, 1906.

1.—Application for Continuance—Discretion of Court.

Where the original petition charged defendant with negligence which would probably result in death, and an amended petition, filed on the day of trial, alleged that death had occurred as the result of the negligence charged in the original petition, a second application for continuance by defendant on the ground of surprise was addressed to the discretion of the court, and it not appearing that such discretion was abused the action of the court in overruling said application was not reversible error.

2.—Death of Wife—Value of Services.

The value of the services of a wife is a matter not provable alone by an expert. The term services, as used at common law in relation to the labor performed and aid rendered by a wife, does not properly represent the dignity of the wife's work as a member of the matrimonial partnership. Her duties are those of a wife, and are not to be valued as those of a servant or hireling. The fruits of her labor belong to the community as do those of the husband, and the same rules that apply to the one apply to the other. The value of a wife's labor and aid is a matter of common knowledge, and when there is no testimony concerning it the jury may, upon a proper state of facts, proceed to estimate it according to their best judgment.

3.—Death—Contributing Cause.

Where the wife of the plaintiff had consumption at the time of her exposure to cold through the negligence of the defendant, and such negligence reasonably and naturally aggravated the disease and hastened her death, the defendant would be liable if such death was a proximate result of said negligence. In such case the defendant's negligence would be a contributing cause of the death, and the negligence could not be excused on the ground that death would have occurred later. This fact goes only to the amount of damages.

Appeal from the District Court of Jack County. Tried below before Hon. J. W. Patterson.

N. H. Lassiter, Robert Harrison and *Sil Stark,* for appellant.—The evidence set out in the application was of the utmost importance to

the defendant, and as the necessity for it arose only after the amendment was filed, the defendant was entitled to a reasonable time to procure it. The original suit abated at the time of Mrs. Groner's death, and the amendment presented a new cause of action, and, technically, the defendant was entitled to have the original suit dismissed and a new citation served on it before it was required to answer the new cause of action set up. It was, for a stronger reason, entitled to a continuance to defend against the new cause of action, if, as the application shows, it was not prepared with evidence to refute it. Low Water Company v. Hickson, 74 S. W. Rep., 782; St. Louis S. W. Ry. Co. v. Terry, 22 Texas Civ. App., 177; Hony v. Gamel, 62 S. W. Rep., 76.

The witness Groner did not qualify, and did not show that he knew whether the estimate he was asked to give was reliable or otherwise. His testimony simply gave his opinion and was a pure guess, and was inadmissible. Cameron Mill Co. v. Anderson, 78 S. W. Rep., 971; Gulf, W. T. & P. Ry. Co. v. Staton, 49 S. W. Rep., 278; San Antonio & A. P. Ry. Co. v. Barnett, 66 S. W. Rep., 477.

There is no evidence in the record to justify the verdict which the jury awarded in favor of F. S. Groner and W. C. Groner, Jr., as the evidence showed that each of these persons was an adult and showed that F. S. Groner was married and did not live with the deceased Mrs. Groner; and the evidence wholly fails to show that either of these adult children received or had any reason to expect any assistance or service or pecuniary benefit from the deceased. San Antonio & A. P. Ry. Co. v. Long, 87 Texas, 152.

Nicholson & Fitzgerald, for appellees.—The application for a continuance being defendant's second application and the subpoenas attached to said application having been issued six months prior to the date of said application, and having been disobeyed at a former term of the court, and the testimony to be proven by the witnesses Beulah Harnback and Georgia Light, being only a matter of opinion, and not admissible, and the expert testimony of the physicians expected to be proven, not being probably true (because a number of expert witnesses for defendant testified on the trial of the case, and would not swear that they could tell about whether or not Mrs. C. C. Groner contracted consumption prior to November 8, 1904,) there was no error in the action of the court in overruling said application. The amended original petition of plaintiff did not set up a new cause of action, and said application failing to show any diligence, it was properly overruled. Missouri, K. & T. Ry. Co. v. Wright, 19 Texas Civ. App., 49; Belknap v. Groover et al., 56 S. W. Rep., 249; Owen v. Cibolo Creek, etc., Mining Co., 43 S. W. Rep., 297. On question of new cause of action, see Gulf, C. & S. F. Ry. Co. v. Richards, 32 S. W. Rep., 96; Lee v. Boutwell, 44 Texas, 152.

Minor children, the mother of whom has been killed by the negligence of a railway company, are entitled to recover damages, and the fact that the work and services rendered by the mother of said children, prior to her death, is performed afterward by another, will not defeat such right to recover. Gulf, C. & S. F. Ry. Co. v. Younger, 38 S. W. Rep., 1121; Gainesville, H. & W. Ry. Co. v. Lacy, 86 Texas, 244; Dallas, etc., Ry. Co. v. Elliott, 7 Texas Civ. App., 220.

CONNER, CHIEF JUSTICE.—Appellee, W. C. Groner, on January 30, 1905, instituted suit in the District Court of Jack County to recover damages to himself and wife in the sum of twenty thousand dollars, resulting from alleged negligence on appellant's part in failing to keep certain of its depots sufficiently warmed while Mrs. Groner was detained therein waiting to take certain trains as a passenger, by reason of which it was charged she contracted a deep-seated cold, causing mental and physical pain, loss of time, expense of sickness and probably death.

On the day of the trial, September 12, 1905, appellee W. C. Groner, joined by the children of the marriage, filed an amended petition with allegations substantially as before, save it was averred that as a proximate result of the wrongs charged Mrs. Groner died on the 22d day of the preceding July.

The trial was before a jury and resulted in a judgment for appellees for $2,500, apportioned as specified in the verdict.

Error is first assigned to the action of the court in overruling appellant's second application for a continuance. In the bill of exception taken to this action of the court it is alleged that the appellant company did not know that appellee would claim that the death of Mrs. Groner was the result of the alleged negligence of the appellant, nor that appellee would claim of defendant damages therefor, until September 11, 1905, when appellees' attorney handed to appellant's attorney an amended petition in which it was for the first time claimed that Mrs. Groner was dead, or that her death was the proximate result of the negligence alleged. It was charged that Mrs. Groner's death was caused from tuberculosis of the lungs, or consumption, and was not the proximate result of the negligence alleged by the appellees, and that if given an opportunity to do so, appellant could prove by the witnesses named in its application facts tending to show that on the 8th day of November, 1904, (the day upon which appellees alleged she had undertaken her journey), Mrs. Groner was sick and then had symptoms of consumption; that by one, Dr. Briggs, a resident of Dallas County, appellant could prove that in February, 1904, he was her attendant physician while in a sanitarium from February 15, 1904, until June 26, 1905; that at this time Mrs. Groner was suffering with tuberculosis of the lungs, or consumption, in an advanced stage. And appellant alleged that it could further prove by this witness and also by Doctors Derringer and Walker, residing in Fort Worth, Tarrant County, Texas, that from the development of Mrs. Groner's disease on February 15 it was impossible for her to have acquired it as late as November 8, 1904, and that she could not have acquired said disease from exposure to cold or chilly weather on that date. The application further stated that if given an opportunity appellant could procure many other witnesses to testify that Mrs. Groner had been exposed to consumption in her home prior to November 8, 1904; that one son, Jesse Lee Groner, died from this disease in her said home on September 14, 1904; that a Miss Warden died of consumption in deceased's home some time prior to the death of Jesse Lee Groner; that Mrs. Groner was exposed to said disease from said sources and that she did acquire said disease prior to the date of her journey. The application excused appellant's want of diligence in procuring the testimony suggested because of surprise and of the want of

knowledge of its materiality, as stated, and in other respects seems to be in conformity with the statute.

We have concluded, however, that the application was addressed to the sound discretion of the court, and we feel unable to say that such discretion was abused. The original petition is very full of allegations that the negligence alleged, proximately resulted in an illness of Mrs. Groner that was serious and permanent, and that such sickness would probably cause her death. If appellant desired to receive more particular information as to the character or manifestations of the sickness charged to have resulted from appellant's negligence, an exception should have been leveled at the petition calling for the additional information. It was not alleged in either the original or amended petitions that Mrs. Groner died of tuberculosis or consumption. This was a defense presented by appellant, together with the further defense that the disease named could not have been caused by exposure to cold on the date when it was alleged Mrs. Groner was exposed thereto, and it would seem that appellant should have been prepared with the proof, if any was obtainable, supporting these defenses. They seem alike applicable to the cause of action alleged in both the original and amended petitions. Nothing new was presented by the amended pleadings other than a result of negligence that had been before alleged to be probable, and hence appellant could hardly have been surprised. That appellant was not surprised is indicated by the fact that upon the trial it proved that a few months prior to the time she undertook her journey on the cars, Mrs. Groner's son, Jesse Lee Groner, died of consumption after an illness of several weeks, during which he was nursed by his mother. Appellant also developed by the testimony of one or more physicians that consumption is acquired from a germ, the tubercle bacilus, and that this germ is communicable from a person suffering with consumption; that consumption could not be produced by "catching cold" or "exposure to cold"; and it further appeared that at least one of the witnesses named in the application for continuance had been theretofore subpoenaed for the purpose, as stated in the application, of proving that Mrs. Groner was sick on November 8, 1904, and then had symptoms of consumption. So that, on the whole, we feel that we must overrule the first assignment of error.

In the second assignment it is urged that the court committed error in overruling appellant's objections to the testimony of appellee W. C. Groner to the effect that in his opinion the reasonable value of his wife's services in the care of the household and in the performance of her duties in training and caring for the children, was six hundred dollars per year. The objections were that the testimony was irrelevant, hearsay and does not tend to prove any fact at issue; that there was no evidence in the case that the witness had any knowledge of the fact of which he was testifying. The objections made are plainly untenable, and it is not suggested that the witness had failed to fully state the kind and character of his wife's services. The question is not one provable alone by an expert, as in the case of Cameron Mill Co. v. Anderson, 78 S. W. Rep., 971, cited by appellant. As said in the case of Gainesville, H. & W. Ry. Co. v. Lacy, 86 Texas, 248: "The term service, as used at common law in relation to the labor performed and aid rendered by a wife, does not properly represent the dignity of the wife's work as a member

of the matrimonial partnership in Texas. She no more owes service to the husband than he to her. Her duties are those of a wife, and are not to be valued as that of a servant or hireling. The fruits of her labor belong to the community, as does that of the husband, and the same rules that apply to the one, under like circumstances apply to the other. The husband usually follows a pursuit which makes a return in money, and the value of his labor can be ascertained by a comparison with that of other men in like employment with like ability. The wife's labor, while equally valuable in the community does not command a price in the market, and therefore can not be proved by experts as can that of the husband." And further, in speaking of evidence as here objected to, uses the following language: "Suppose that in this case a witness had been called to testify as to the value of Mrs. Lacy's labor and aid as a wife. He must simply have given his opinion, formed from knowledge that is common to all men. It would have been one man telling twelve what his opinion was in a given state of facts in evidence before the court, and upon which they were equally as well, if not better, qualified than he to form a judgment. Such testimony is admissible for either plaintiff or the defendant in any case; but if not given, the jury may upon a proper state of facts proceed to estimate the damages according to their best judgment." The assignment is overruled.

The fifth paragraph of the court's charge is objected to in the third assignment, on the ground that it was "calculated to lead the jury to believe that if Mrs. Groner died of consumption, but the alleged negligence of the defendant caused her to die of that disease sooner than she otherwise would have died from it, plaintiff was entitled to recover for causing her death." We do not think the charge is erroneous. The jury were therein expressly instructed that if Mrs. Groner died from tuberculosis of the lungs, or consumption, they should find for the defendant unless they believed from a preponderance of the evidence that defendant was negligent, as charged, and that such negligence was the proximate cause of her death. Nor are we prepared to hold that appellant is relieved from liability on the mere ground that Mrs. Groner died of consumption. While, as stated, there was testimony to the effect that consumption could not be caused by exposure to cold, the same witnesses further testified that a severe cold, or any other cause which lowered a patient's vitality, might allow the germs to find lodgment and the disease to begin its ravages, when, except for this lowering of vitality, the patient might have "walled up" the germs and thrown them off without injury. If therefore, appellant's negligence proximately produced a condition of health rendering Mrs. Groner susceptible to the disease (she being otherwise in good health) and as a natural and probable consequence she in fact became affected with the disease and her death resulted therefrom, appellant would be liable. Or even if Mrs. Groner at the time of her exposure to cold, was afflicted with the disease, and appellant's negligence reasonably and naturally aggravated it and hastened her death appellant would be liable, if such death, as submitted by the court, was a proximate result of the negligence charged. In such case appellant's negligence would be at least a contributing cause of the death, and in such event the negligence can not be excused on the ground that Mrs. Groner's death would have occurred later. Death to

all must come sooner or later, and we do not understand that the laws will relieve the wrongdoer of liability upon speculative grounds such as indicated in the objections. At most the question goes to the amount of damages only.

What we have said in the disposition of the third assignment of error also disposes, we think, of the fourth, which complains of the refusal of the court to give appellant's special charge No. 3. The effect of this charge would have been to instruct the jury that if they found that Mrs. Groner died of consumption and that such disease could not originate without the germs entering the body from without, they should find for appellant.

The remaining assignment complains of the amount of the verdict and of its apportionment among the appellees, but we think the assignment without merit, and the evidence supporting the material allegations of appellees' petition, it is ordered that the judgment be affirmed.

Affirmed.

Writ of error granted, cause reversed and remanded.

L. C. DUNLAP v. RAYWOOD RICE CANAL AND MILLING COMPANY.

Decided May 23, 1906.

1.—Unsigned Verdict.

The provision in article 1323, Revised Statutes, that the verdict in a civil case "shall be in writing and signed by the foreman of the jury" is directory, and objection to the verdict on this ground, after it has been received and the jury discharged, comes too late.

2.—Special Issues—General Verdict.

Where a case is submitted to the jury on special issues alone, and the jury, besides answering the special issues, returns a general verdict also, the general verdict should be disregarded by the court in rendering judgment.

3.—Crop—Breach of Contract—Measure of Damages.

Plaintiff sued defendant for breach of contract to furnish water to make a rice crop. The proper measure of damages is the reasonable market value of his share of the crop which plaintiff failed to make, but which he would have made but for the default of defendant, less the additional expense of raising and marketing a full crop over and above the expense of raising and marketing the crop that was in fact made.

4.—Special Issues—Material Issue Omitted.

Even though a material issue should not be submitted to the jury, still the judgment will be sustained if an answer to the question can be found from the evidence in the record.

5.—Evidence—Judgment.

Evidence considered and held, not to warrant the judgment.

Appeal from the District Court of Liberty County. Tried below before Hon. L. B. Hightower.

G. W. Tharp and *E. B. Pitckett, Jr.*, for appellant.—The court erred in rendering judgment on the special verdict returned by the jury because the same was not signed by any member as foreman thereof, and it was,

therefore, not proper for the court to consider the same to base its judgment upon. Douglass v. Baker, 79 Texas, 499; Rev. Stats., art. 1323.

The court should have based the judgment on the general verdict. Blum v. Rogers, 71 Texas, 676; Dwyer v. Kalteyer, 68 Texas, 564.

Where the defendant has failed to furnish sufficient water to irrigate the rice, according to contract, the measure of damages would be the difference between what the crop did make and what it would have probably made if it had been properly watered, less the cost that would have been incurred in raising, harvesting and making a full crop, over and above what was incurred in raising, harvesting and making the crop which was, in fact, made. International & G. N. Ry. v. Pape, 73 Texas, 503; Raywood Rice Canal & Milling Co. v. Langford, 7 Texas Ct. Rep., 420.

C. F. Stevens, for appellee.—The statute requiring a verdict to be signed is directory and not mandatory.

When two verdicts are found by the jury, that only will be considered as the proper verdict upon which the judgment of the court is based. McKinnon v. Reliance Lbr. Co., 63 Texas, 30.

Where a special verdict does not find all the facts necessary to form the basis of a judgment, but does answer all the questions submitted, the court is presumed to have found from the evidence the omitted facts necessary to support the judgment if the evidence is presented to authorize the findings thus persumed, hence in this case if it was necessary to show the cost of planting the land and rice separately from the cost of harvesting and making the same, the court is presumed to have found such facts from the evidence although such issues were not submitted to the jury. Leary v. People's B. L. & S. Assn., 49 S. W. Rep., 635; Southern Cotton Oil Co. v. Wallace, 54 S. W. Rep., 638; Galveston, H. & S. A. Ry. Co. v. Botts, 55 S. W. Rep., 514.

REESE, ASSOCIATE JUSTICE.—This suit was instituted by L. C. Dunlap against the Raywood Rice Canal Company to recover damages for failure on the part of the Canal Company to furnish water for plaintiff's rice crops for the years 1900 and 1901, by reason of which, it is alleged, plaintiff failed to make full crops, his loss on this account amounting, for the crop of 1900, to $1,829.26, and for the crop of 1901, to $1,352.50.

The case was submitted to a jury upon special issues. It appears that the response of the jury to these questions was received by the court, is copied into the judgment and is made the basis of the judgment, whereby plaintiff recovered $366. As directed by the court, these answers to the questions submitted to them were written upon a separate piece of paper, but they were not signed by the foreman of the jury. Copied in the record is also a general verdict for the plaintiff for $1,333.92 signed by the foreman. This general verdict is not referred to in the judgment and no notice appears to have been taken of it by the court. From the judgment of the court in his favor for $366 plaintiff appeals.

In the first assignment of error appellant complains of the judgment based upon the special verdict because the same was not signed by the foreman of the jury. No objection was made to receiving the verdict on this account, the objection first appearing in the motion for a new trial. The special verdict is copied in the record from which it appears

that it was not signed by the foreman of the jury. It is provided by article 1323, Revised Statutes 1895, that the verdict (in a civil case) "shall be in writing and signed by the foreman of the jury," and it is insisted that this provision is mandatory, and that a verdict not so signed can not form the basis of a judgment.

We can not find that this question has been directly decided in this State. A similar statute in Kentucky was declared directory merely by the Supreme Court of that State, and it was held that an objection to a verdict on this ground came too late after the jury was discharged. (Berry v. Pusey, 80 Ky., 170.)

The same construction was placed upon a statute to the same effect in Iowa (20 Iowa, 465), and in Missouri (Menne v. Neumeister, 25 Mo. App., 300, distinguishing the case of Sage v. Brown, 34 Ind., 464). Similar statutes have been held directory in this state. (Norwood v. Snell, 68 S. W. Rep., 773.)

We think the provision of the statute that the verdict shall be signed by the foreman of the jury should be held to be directory, and that objection to the verdict on this ground, made after it has been received and the jury discharged, comes too late.

It is also urged by appellants in the second assignment of error, that the court erred in not rendering judgment upon the general verdict signed by the foreman, which is copied in the record. The authorities cited in support of this proposition (Blum v. Rogers, 71 Texas, 676, and Dwyer v. Kalteyer, 68 Texas, 564) are not in point. In those cases the jury was directed to return a general verdict as well as to answer the questions submitted as special issues. The general verdict so returned could not properly be ignored by the court. In the present case there was no authority for the return of the general verdict. The case was submitted to the jury on the special issues alone. Unless made the basis, in some way, of a bill of exceptions it had no proper place in the record. It was properly ignored by the court in rendering judgment.

This also disposes of the fourth assignment which substantially raises the same objections to the judgment as those presented by the first and second assignments.

It is further insisted by appellant that if the special verdict could properly form the basis of a judgment, under the objections made, the court erred in applying the measure of damages thereto.

The proper measure of damages in a case of this kind is the reasonable market value of his share of the crop which appellant failed to make, but which he would have made but for the failure of appellee to furnish water in accordance with his contract, less the additional expense of raising and marketing a full crop over and above the expense of raising and marketing the crop that was in fact raised. (Raywood Rice Canal & Milling Co. v. Langford, 74 S. W. Rep., 926.) One-half of the additional crop which should have been realized belonged to appellee under the contract, but would have had to be raised and harvested at the expense of appellant, so that it would be right to deduct from the value of appellant's half of the additional crop what would have been the additional expense of raising and harvesting the entire crop. This would have given the net market value to appellant of the loss of crops sustained by reason of the breach of contract by appellee.

By the questions submitted to the jury they were required to find, among other things, the amount of rice that was raised by appellant for each of the years in question, the amount that would have been raised if appellee had furnished water in accordance with his contract, and the market value of the rice. No question was submitted to the jury as to the additional expense of raising and marketing the additional crop which would have been realized if appellee had furnished the water, without which it would have been impossible to find from the verdict what amount of damages appellant was entitled to recover. Instead of this, the jury was required to find "what was the cost of raising and harvesting a crop of rice" during each of the years 1900 and 1901, to which they replied that such cost was $10 per acre.

The jury also answered that appellant planted in 1900, 120 acres and in 1901, 145 acres, that he made in 1900, 374 sacks of rice and would have made 1,200 sacks, that he made in 1901, 1,100 sacks and would have made 1,450 sacks, if the crops had been watered. Applying the proper measure of damages to the facts thus found, it would appear that for the year 1900 appellant would have made, if the crop had been watered, 1,200 sacks, of which 600 sacks would have been appellant's share. Of the 374 sacks which were made it appears that appellee was entitled to one-half for land and water rent, which left 187 sacks for appellant. Appellee, however, remitted the one-fifth for water rent, 74 sacks, which added to the 187 sacks, made the amount actually received by appellant for 1900, 261 sacks, disregarding fractions. Deduct this from the 600 sacks he ought to have made, shows a loss to appellant of 339 sacks, which at $3.00 per sack was worth $1,017. For 1901 the result would be, crop which should have been made 1,450 sacks, of which appellant's share would have been 725 sacks; crop made 1,100 sacks, of which appellant received one-half or 550 sacks, making appellant's loss 175 sacks, which at $3.00 per sack was worth $525. The value of appellant's shares of the crop lost for 1900 and 1901 was $1,542 according to the finding of the jury. From this should be deducted the additional cost of making and harvesting the additional crops that would have been made if the crop had been watered, of 826 sacks for 1900 and 350 sacks for 1901, a total of 1,176 sacks.

As we have seen, the instructions of the court to the jury did not submit this issue, and they were not required to say how much this additional cost amounted to. Obviously, the reply that the cost of raising and harvesting a crop of rice per acre was $10 did not answer the question that was required to be answered, or enable the court from this information alone to apply to the facts found the proper measure of damages, as this $10 per acre included the entire cost of the full crop, which included the cost of the crop in fact made.

The proper special issue not having been submitted the judgment will still be sustained, if from the evidence such an answer to the question can be found as will sustain the judgment. The only evidence on this issue to be found in the record is the testimony of appellant and of appellee's witness Simmons. Taking the testimony of Simmons as most favorable to appellee, it is found that he testifies that "it would cost about $4.00 per acre to get the crop planted and in good shape, and as to harvesting it, it would depend upon how much you raised, and the kind

of deal you made, and how much you had to pay for labor. If you had a crop of, say, ten or twelve sacks per acre at Raywood it would cost, I think, to cut rice, stack it, thresh it, haul to the thresher and put it in sacks, about $8 per acre. A good crop would cost from $10 to $12 per acre."

If we consider that the $4 per acre was the cost of planting and cultivating up to harvesting, which amount it had cost appellant for the crop raised by him, and that $12 per acre was the entire cost of planting, cultivating and harvesting, this would leave, as the witness testifies, $8 per acre for the expense of harvesting and putting into sacks. As the jury found that a full crop, if watered, would have been 10 sacks per acre for each year, this would have been made not more than 80 cents per sack additional cost of planting and harvesting the crop which appellant would have made and did not make. As he did not have to pay out this, and would have had to pay it out if the full crop had been made, 80 cents per sack on the entire amount of shortage would have to be deducted to show the net loss to appellant. This shortage for both years was, as we have seen, 1,176 sacks. Eighty cents per sack upon this would be $940, which amount deducted from the total value of appellant's share of the shortage in the crops, $1,542 would leave a net loss to appellant of $601.20, instead of $366, the amount of the judgment. Appellant testified directly as to what the additional cost of a full crop would have been, which would have made his net loss much larger. Appellant in his brief has explained the manner in which the trial court arrived at the amount of the judgment, that is, by deducting $1.00 per sack from the market value of the 1,176 sacks shortage as the additional cost to appellant of harvesting the full crop. This finding is not sustained by anything in the evidence. As the case was submitted upon special issues the jury should have been required to say specifically what the additional cost would have been of planting, cultivating and harvesting such a crop as appellant would have made over and above what the crop that was made cost, but the judgment would not be disturbed on that account if any evidence could be found upon this issue that would sustain the judgment for the amount for which it was rendered. Appellee in its brief has not attempted to explain how this result was arrived at. The court seems to have applied the proper measure of damages, but in doing so to have arrived at an incorrect result.

We think the judgment should be reversed and a new trial granted, and it is so ordered.

Reversed and remanded.

FRIENCH SIMPSON ET AL. v. WELLS THOMPSON.

Decided May 23, 1906.

1.—**Conflicting Testimony—Reading to Jury Irrelevant Pleadings.**

Where plaintiff's suit is founded upon charges of fraud in procuring a settlement of accounts, and certain other portions of his pleading which charged fraud and treachery in another and distinct transaction were stricken out by

the court, and the testimony upon the question of fraud in procuring the settlement was sharply conflicting, it was error to permit the plaintiff to read to the jury that portion of his pleading which had been stricken out.

2.—Same—Irrelevant Testimony.

Where the testimony is conflicting it is reversible error to permit a party to read to the jury portions of his pleading which had been stricken out on exception, and to testify concerning the facts alleged in said pleading, and for the court in its charge to call attention of the jury to such irrelevant transaction.

3.—Authority of Bank to Apply Deposits.

A bank has the right to apply the amount of dividends that come into its hands on the note of its debtor.

Appeal from the District Court of Colorado County. Tried below before Hon. Munford Kennon.

McCormick & Brown and *Brown & Lane,* for appellant.—Where, in a case tried before a jury, such as the one now under consideration, there was a sharp conflict in the testimony between the plaintiff on the one side and the two defendants, who are appellants, on the other, and where the jury were compelled to discredit the testimony of the two defendants in order to give plaintiff a verdict, and where plaintiff's pleadings, as in this case, contained allegations prejudicial to the character and business dealings of said defendants, it was error for the court below, after having sustained demurrers to said allegations, to permit plaintiff to read them to the jury. Rev. Stats., art. 1291; Rules for District Court, No. 26; Fort Worth and R. G. Ry. Co v. Lindsey, 32 S. W. Rep., 714.

Where a case, such as the one now under consideration, is being tried before a jury, and there is a sharp conflict in the testimony between the plaintiff on the one side and the two defendants, who are appellant, on the other side, upon the only question that was really at issue between the parties and upon which question alone the court submitted the case to the jury, and where the jury were compelled to discredit the testimony of the two defendants in order to give a verdict in favor of plaintiff, and where the plaintiff's pleadings, as in this case, contained allegations immaterial to the issue being tried, but highly prejudicial to the character and business dealings of the defendants, it was error, prejudicial to defendants, for the court, after having first sustained demurrers to such allegations, to afterwards, at the trial, permit plaintiff, over defendants' objection, to read such allegations to the jury; and the injury and hurt to defendants was intensified by permitting plaintiff, in his testimony, to testify about the matters set up in his pleadings to which defendants had demurred, and to testify before the jury that he had never received any benefit from the $17,300 notes, that they were procured from him by one of the defendants upon false representations, and the like, as set forth in the statement of facts and bills of exceptions. And that defendants were injured thereby is manifest in view of the action of the jury in returning a verdict against all three of the defendants, when there was no proof to sustain it as to one of them, Harbert, and to avoid

which plaintiff was compelled to remit the amount recovered against said Harbert.

The court having through erroneous rulings on pleadings and evidence brought about a verdict, improper and prejudicial to defendants, he should have sustained their motions for a new trial, and the verdict and judgment should have been vacated and set aside.

Foard, Thompson & Townsend, for appellee.—Where the parties make a settlement concerning a particular matter or transaction, it will not be implied that items of credit arising from other and distinct transactions are to be included in such settlement; and in order to hold that dividends arising from another and distinct source were included by authority of plaintiff in said settlement, it would be necessary to find that he actually knew of the existence and deposit of the dividends, and knowingly acquiesced in their appropriation as a credit, or that his failure to ascertain such fact was negligence. The charge was correct in presenting this view of the law.

There were pleadings and proof of such friendly and confidential relations between plaintiff and defendants as to require disclosure of the receipt and appropriation of the dividends to plaintiff, and the issue was properly submitted by the charge. Cockrill v. Cox, 65 Texas, 676; Railway Company v. O'Donnell, 58 Texas, 42; Insurance Co. v. Ice Co., 64 Texas, 583; International & G. N. Ry. Co. v. Leak, 64 Texas, 659; Harrell v. Houston, 66 Texas, 280; Weaver v. Nugent, 72 Texas, 278.

FLY, ASSOCIATE JUSTICE.—This is a suit instituted by appellee against Stephen Harbert and the Simpson Bank of Columbus, Texas, a co-partnership, alleged to consist of Carey Shaw and Friench Simpson, to recover certain dividends due him as stockholder in a corporation known as the "Colorado County Texas Land Association." It is alleged that Simpson was the president of the corporation and Harbert its treasurer; that Harbert and the bank had charge of the books of the corporation and refused appellee access to them and refused to render a statement of the condition of the affairs of the corporation; that Harbert had paid to the bank certain dividends due to appellee and that it then held the money. Appellants answered that appellee was indebted to the Simpson Bank in a large sum of money, and being sued for the same settled with the bank by conveying to it certain lands on which it had a deed of trust and giving his notes for $5,000. That at that settlement all sums paid into the bank for appellee by any one were included in a statement made as a basis for the settlement, and appellee had full credit for all such sums, among such sums being all the dividends paid into the bank by any one. The cause was tried by jury and resulted in a verdict for appellee for $1,344. On that verdict judgment was rendered against Carey Shaw and Friench Simpson, as individuals and as co-partners in the Simpson Bank, and against Stephen Harbert for $1,050, and against Shaw and Simpson individually and as partners in the Simpson Bank for $294. In other words, the judgment was against Shaw and Simpson for $1,344 and against Harbert for $1,050. Afterwards the judgment so far as Harbert was concerned was set aside, on motion of appellee, and he was dismissed from the suit.

Appellee filed a supplemental petition which contained special demurrers and much new matter. This new matter was excepted to by appellants and the court sustained exceptions to those parts of the petition "setting up any matter or matters extraneous to the issue on the question as to whether any dividends of the Colorado County Texas Land Association were paid over to the Simpson Bank, and as to whether or not said dividends were included in the settlement of accounts between the Simpson Bank and the plaintiff of date February, 1903." The ruling is not free from obscurity and leaves open the question as to what was or was not considered extraneous to the issue named, but it had reference to some parts of the petition, and it may be safe to include in the extraneous matter the allegations in the supplemental petition in regard to an oil mill enterprise which appellee states he was solicited to enter by Carey Shaw, which enterprise had no connection whatever with the matters involved in this suit. In those allegations, which were utterly foreign to the issues in this case, Shaw was charged with acting in bad faith with appellee, and with fraud and concealment as to the affairs of the enterprise. The court very properly sustained exceptions to the allegations, but over the objections of appellants allowed the pleadings, to which the exceptions had been sustained, to be read to the jury.

The record discloses an irreconcilable conflict between the testimony of appellee on the one side, and the testimony of Shaw and Simpson on the other. Appellee swore that he did not know that any dividends had been declared by the land association and Shaw, and Simpson swore that he did, and that he had attempted to draw the amount of the dividend for $1,050 out of the bank. Shaw stated that in 1898, appellee had demanded the dividend for $1,050 and that the former told the latter that it had been applied on his debt. With this state of case a small circumstance might turn the balance in favor of one party or the other, and it can not be ascertained how much influence the charges of bad faith and fraud upon the part of Shaw in regard to the oil mill enterprise may have had upon the minds of the jury. They may have taken the allegations as expressing the truth as to that transaction and could well argue that if appellants, or either of them, had acted in bad faith and violated the trust of a man who had placed the utmost confidence in them at one time, they did it in this instance. Fraud and deception had been charged in procuring the settlement of the matters pending between appellee and the Simpson Bank, and allegations as to the same conduct in another transaction might have had a strong influence in shaping the verdict of the jury. We can not say that it did not have that effect upon the jury, and in view of the conflicting evidence it may be reasonably assumed that it did affect the verdict. It is true that the objectionable pleadings were not read as evidence, but the jury would probably not draw that distinction. The court should have required appellee to replead, or at least have prevented him from reading the objectionable pleadings to the jury.

Under the facts there was but one issue in this case, and that was whether or not the dividend for $1,050 had been included in the settlement of February, 1903, and the one for $294 had afterwards been credited to appellee. How the indebtedness to the Simpson Bank was

brought about had nothing to do with the case. Appellee owed the bank, he does not deny that; he made a settlement of that indebtedness by the transfer of certain property to the bank and the execution of his note for $5,000. It made no difference whatever what the original consideration for the indebtedness was, and testimony in regard to transactions between the parties as to an oil mill enterprise was out of place. The court must have entertained this view of the matter when it sustained the exceptions to that part of the supplemental petition setting up the oil mill transaction, but afterwards not only permitted the obnoxious pleadings to be read to the jury, but actually permitted appellee to testify that his indebtedness of $17,300 to the bank grew out of the old Columbus Oil Mill transactions, and that he never "got a nickle in cash" for the notes he gave for the indebtedness; that the original notes, that formed the basis of the settlement of February, 1903, were given for what Shaw told him was his proportion of the losses. That testimony taken in connection with the pleadings, which were read to the jury, in which fraud and violated confidence were charged against appellants, undoubtedly had an injurious and improper influence with the jury. Not only did the court permit the pleadings and evidence, referred to, to go to the jury, but called the special attention of the jury to the oil mill transaction by charging that appellants had alleged in their answer that the dividends had been placed as credits on certain notes given by appellee to the bank, "which notes grew out of the dealings of the members of the bank and the plaintiff in regard to the purchase and operation of the oil mill." No such allegation appears in the answer of appellants, but the statement that it was therein, taken in connection with the allegations in the rejected pleadings and the evidence of appellee as to the oil mill transaction, must have impressed the jury unfavorably to appellants.

The eleventh and twelfth assignments of error are not well taken. There was no assumption of the fact that both or either of the dividends was or was not included in the settlement between appellants and appellee.

The original pleadings of appellee in this case amount to a bill for an accounting as to all dividends owing to appellee on certain stock in a land company, and for judgment against appellants for the amount of such dividends. In his supplemental petition appellee denied that the dividends entered into the settlement between the parties. The uncontradicted evidence showed that the dividend for $1,050 was included in the settlement, and that appellee had the advantage of it whether he knew it or not, and he does not prove that he was not indebted to appellants in the sum he agreed to pay in the settlement, but his sole contention is that he did not know that the dividend was included in the settlement, and if he had known that it was to enter therein he would not have settled. If the dividend for $1,050 was included in the settlement and appellee had the benefit of it, he can not again collect it and obtain a second benefit from it, although he may not have known of its inclusion in the settlement. The court recognized this principle in the third paragraph of his charge, but afterwards stated rules, which, although they were correct as general propositions, when not qualified were calculated to mislead the jury. For he informed the jury that matter

intended by both parties to enter into a contract bound both parties, and that if it was intended by one party to be included and the other party had reasonable opportunity to know that fact, and if such other would be deemed negligent in failing to ascertain the fact, that he would be bound, but otherwise he would not be bound. That proposition of law should have been qualified in this case by an instruction that in order to recover the burden rested upon appellee to rebut the case made by appellants and show that he had not been credited with the amount of his dividends for $1,050 in the settlement between him and appellants. This doctrine would obtain, although appellee had no opportunity offered to inspect the account books of appellants or statements made by them, because the duty devolved on appellee to rebut the case made by appellants and to show that they owed him for the dividends, and if he had in fact been credited with the dividends, he failed to establish any indebtedness by appellants to him. The matter of knowledge of appellee, as to the inclusion of the dividends or either of them in the settlement, could only be of importance in the event that it was shown that appellee was indebted to appellants in the sum he agreed to pay less the amount of the dividend for $1,050. Appellants pleaded and proved a settlement in which one of the dividends was included as a credit to appellee, and he could not recover unless he rebutted that proof by showing that he had not received the benefit of that credit.

One of the dividends, that for $294, was collected after the settlement between the parties, and if appellants credited it on the debt due by appellee to them, he could not recover it although it was not included in the settlement. It follows that if it was not credited to appellee that he is entitled to recover for that amount, but the evidence was uncontradicted that it was placed as a credit on appellee's debt to appellants. The Simpson Bank undoubtedly had the right to apply the amount of the dividend that came into its hands, on the debt due by appellee. (Zane, Banks and Banking, sec. 140.)

All the matters of importance have been considered. It follows that the judgment of the trial court should be reversed and the cause remanded for a trial on the lines indicated in this opinion.

Reversed and remanded.

TEXAS & NEW ORLEANS RAILWAY COMPANY v. W. W. WALKER ET AL.

Decided May 23, 1906.

1.—Evidence—Opinion—Time Required to Transport.

Evidence considered and held sufficient to qualify a witness experienced in shipping cattle over a certain route to testify as to the reasonable time required for their transportation.

2.—Carrier of Live Stock—Negligence.

Evidence held sufficient to show negligent delay of cattle in transportation to market.

Appeal from the County Court of Bell County. Tried below before Hon. W. R. Butler.

Baker, Botts, Parker & Garwood and *Geo. W. Tyler*, for appellant.—

Plaintiff had not shown, in his answers, that he was qualified from experience or otherwise to give an opinion as to the reasonable time required to transport cattle from Belton to New Orleans. International & G. N. Ry. Co. v. Kuehn, 2 Texas Civ. App., 215; Houston & T. C. Ry. Co. v. Smith, 52 Texas, 186; Sabine & E. T. Ry. Co. v. Brousard, 69 Texas, 622.

The evidence was insufficient to show negligent delay by defendant. Rev. Stats., art. 326; Rev. Stats. U. S. (1878), arts. 4386-4390; Galveston, H. & S. A. Ry. Co. v. Warnken, 35 S. W. Rep., 73; Missouri Pac. Ry. Co. v. Ivy, 79 Texas, 446; St. Louis, A. & T. Ry. Co. v. Turner, 1 Texas Civ. App., 632; Chicago, R. I. & T. Ry. Co. v. Kapp, 83 S. W. Rep., 233-4.

Pendleton, Ferguson & Durrett, for appellee.—The witness showed himself qualified to give his opinion. Gulf, C. & S. F. Ry. Co. v. Norfleet, 14 S. W. Rep., 703; 17 Cyc., 31-41, and see note 66, page 31, and note 67, page 32, for citation to State Courts.

EIDSON, Associate Justice.—This is an action for damages to a shipment of cattle from Belton, Texas, to New Orleans, Louisiana, made by appellee Walker over the roads of the Missouri, Kansas & Texas Railway Company of Texas and appellant. The case was tried before the court without a jury and judgment rendered in favor of appellee against the appellant for $220 and costs of suit and in favor of the Missouri, Kansas & Texas Railway Company of Texas.

The testimony, the admission of which is complained of in appellant's first assignment of error, was properly admitted. The testimony of the witness that he went with the shipment involved in the suit and that he had made shipments since that time over the same roads, though he did not go with them, and that he had made shipments from Belton to New Orleans over the Santa Fe road, in connection with the fact that the court will take judicial notice of the respective runs and locations of the Santa Fe road and that of the Missouri, Kansas & Texas Railway Company of Texas from Belton to New Orleans, showed him qualified to testify as to the reasonable time required to transport cattle over the roads of the Missouri, Kansas & Texas Railway Company of Texas and Texas & New Orleans Railway Company from Belton to New Orleans. (East L. & R. R. Ry. Co. v. Rushing, 69 Texas, 313; Gulf, C. & S. F. Ry. Co. v. State, 72 Texas, 410; Railway Company v. Graves, 2 Civ. Cases, Willson, 598.)

Appellant's other assignments of error contend that the findings of the court that appellee's cattle were unreasonably delayed during the course of transportation through the negligence of appellant, and that appellee was damaged as the direct result of such negligence, are not supported by the evidence. We do not agree with appellant in this contention. While there is a sharp conflict in the testimony on the issue of negligence on part of the appellant, in our opinion, it is sufficient to justify the findings and judgment of the court.

None of the appellant's assignments of error are well taken and the judgment of the court below is therefore affirmed.

Affirmed.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS v. J. J. CROW.

Decided May 23, 1906.

Railway—Overflowing Land—Negligence.

The right to recover damages for flooding plaintiff's land, caused by construction of a railway, is not dependent on negligence in the construction. It is given by the statute (Rev. Stats., art. 4436), wherever the company fails to construct the necessary culverts and sluices, as the natural lay of the land requires for the necessary drainage thereof.

Appeal from the County Court of Bell County. Tried below before Hon. W. R. Butler.

Crow sued the railway company and had judgment and defendant appealed.

T. S. Miller and *Geo. W. Tyler,* for appellant.—The court did not find any negligence whatever on the part of defendant. Rev. Stats. (1895), art. 4436; Railway Company v. Elam, 1 W. & W. Civil Cases, sec. 447; Ashley v. Wolcott, 11 Cush., 192; Turner v. Dartmouth, 13 Allen, 291.

Pendleton, Ferguson & Durrett, for appellee.—The finding of the court (that defendant's embankment concentrated the overflowing waters of Little River and discharged them through a culvert in a current upon plaintiff's land, damaging it), supports his conclusion that plaintiff was entitled to recover. St. Louis S. W. Ry. Co. v. Baer, 86 S. W. Rep., 653; San Antonio & A. P. Ry. Co. v. Gurley, 83 S. W. Rep., 842; Texas & P. Ry. Co. v. Whitaker, 82 S. W. Rep., 1051; San Antonio & A. P. Ry. Co. v. Kiersey, 86 S. W. Rep., 744; Austin & N. W. Ry. Co. v. Anderson, 79 Texas, 427; St. Louis & S. F. Ry. Co. v. Craigo, 31 S. W. Rep., 210; Texas & P. Ry. Co. v. Overheiser, 76 Texas, 437; Sabine & E. T. Ry. Co. v. Woods, 69 Texas, 679; Gulf, C. & S. F. Ry. Co. v. Pomeroy, 67 Texas, 498.

EIDSON, ASSOCIATE JUSTICE.—This is an action brought by appellee against the appellant for damages to crops from overflow caused by the alleged negligence of appellant in failing to construct and maintain the necessary culverts and sluices through and under its embankment across Little River bottom, adjacent to appellee's land, for its necessary drainage according to the natural lay thereof. The case was tried by the court without a jury and judgment was rendered for appellee for the sum of $200 and costs of suit.

Appellant's contention that appellee was not entitled to recover, unless it was shown that appellant was negligent in the construction of its road, embankment, culverts or sluices, is not sustained by the authorities. The requirement of the statute, that the railroad company shall construct the necessary culverts and sluices, as the natural lay of the land requires for the necessary drainage thereof, is absolute, and the right to recover damages resulting from a failure to comply with such require-

ment is not dependent upon whether or not the railroad company was guilty of negligence. (Sayles' Rev. Stats., art. 4436; St. Louis S. W. Ry. Co. v. Baer, 86 S. W. Rep., 653; San Antonio & A. P. Ry. Co. v. Kiersey, 86 S. W. Rep., 744; San Antonio & A. P. Ry. Co. v. Gurley, 83 S. W. Rep., 842.)

The findings of fact and judgment of the court are supported by the testimony as shown by the record. There being no reversible error pointed out in the record, the judgment of the court below is affirmed.

Affirmed.

Louisville & Nashville Railroad Company v. Fred Emerson et al.

Decided May 23, 1906.

Jurisdiction—Nonresident—Service.

No personal judgment can be rendered against a nonresident (a railway company created and operating in another State) upon service on it by notice delivered beyond this State, under article 1230 of the Revised Statutes.

Error from the County Court of Collin County. Tried below before Hon. F. E. Wilcox.

Hawkins & Haynes, for plaintiff in error.—In suit on moneyed demand in State Court a personal judgment by default against a nonresident defendant, who resides in another State and who was served with notice in such other State, is null and void. York v. State, 73 Texas, 652; Maddox v. Craig, 80 Texas, 600; Donovan v. Hinzie, 60 S. W. Rep., 994; Pennoyer v. Neff, 95 U. S., 714; Wilson v. Seligman, 144 U. S., 45; Cooley's Const. Lim., p. 495.

The rule is also applicable to non-resident corporations that are defendants. Mexican Central Ry. Co. v. Pinkney, 149 U. S., 194; St. Clair v. Cox, 106 U. S., 350; Tillinghast v. Boston & Port Royal Lumber Co., 22 Law Rep. Ann., 49.

Eidson, Associate Justice.—This suit was brought by Fred Emerson against the Missouri, Kansas & Texas Railway Company of Texas, the Missouri, Kansas & Texas Railway Company, the Choctaw, Oklahoma & Gulf Railway Company, the Chesepeake & Ohio Railway Company and the plaintiff in error, the Louisville & Nashville Railway Company, for damages on account of alleged injuries and over-charge in freight in the transportation of one mare and colt from Mt. Sterling, Kentucky, to McKinney, Texas; and, said plaintiff having dismissed his suit as against the defendants, The Missouri, Kansas & Texas Railway Company, the Choctaw, Oklahoma & Gulf Railway Company and the Chesepeake & Ohio Railway Company, the court rendered judgment in favor of plaintiff against the defendant, the Missouri, Kansas & Texas Railway Company of Texas, for $125 and certain costs by virtue of a written agreement by and between plaintiff and the said last named defendant filed in the suit, and also rendered judgment in favor of plaintiff against the appellant, the Lousiville & Nashville Railway Company for $200 and all costs of suit.

It appears from plaintiff's second amended original petition, upon which the trial in the court below was had, that plaintiff in error, the Louisville & Nashville Railway Company, is a corporation duly incorporated under and by virtue of the laws of Kentucky and has its office and place of business at Louisville, Kentucky. The record shows that a notice as to a nonresident in accordance with the provisions of article 1230 et seq., of the Revised Civil Statutes of Texas, was issued in this suit on the 28th day of March, 1904, addressed to the Louisville & Nashville Railroad Company, Louisville, Kentucky; and that said notice together with a certified copy of plaintiff's second amended original petition accompanying the same was on the 30th day of March, 1904, in the city of Louisville, county of Jefferson, State of Kentucky, delivered to M. H. Smith as the president of said company. The judgment against plaintiff in error was predicated upon the service of this citation. We think it clear, under the authorities, that the court below had no jurisdiction to render the judgment against the plaintiff in error, and the judgment as to it must therefore be reversed and the cause remanded. (York v. State, 73 Texas, 652; Maddox v. Craig, 80 Texas, 600; Donovan v. Hinzie, 60 S. W. Rep., 994; Pennoyer v. Neff, 95 U. S., 714; Wilson v. Seligman, 144 U. S., 45.)

It appears from the record that there was an agreed judgment rendered in the court below as to the Missouri, Kansas & Texas Railway Company of Texas, the Missouri, Kansas & Texas Railway Company, the Choctaw, Oklahoma & Gulf Railway Company and the Chesepeake & Ohio Railway Company. That judgment will be affirmed. The costs herein are adjudged against appellee Fred Emerson.

Reversed and remanded in part.
Affirmed in part.

JEFFERSON & NORTHWESTERN RAILWAY COMPANY v. J. J. B. DRESSON.

Decided May 23, 1906.

1.—Damages—Profits of Contract—Other Employment.

The principle on which plaintiff, suing for a breach of contract for his personal services, must deduct, from the compensation he was prevented from earning, whatever he could have made during the time in other employment, does not apply to contracts for other than personal service, such as contracts for railway construction.

2.—Damages—Prima Facie Case.

Where profits in another employment are to be deducted from plaintiff's damages for breach of a contract for his employment, he makes a prima facie case, by showing the profits he would have made under the contract, and it is for defendant to show that by its breach he has been enabled to make other profits in other employment.

3.—Contract—Damages—Pleading.

Where defendant's pleading to a suit for damages for not permitting plaintiff to perform his contract is a denial of the contract, and not a justification of plaintiff's discharge under it, a charge justifying such action on the ground of plaintiff's delay in performance was properly refused.

Appeal from the District Court of Marion County. Tried below before Hon. P. A. Turner.

W. T. Armistead, for appellant.

R. R. Taylor, for appellee.

EIDSON, Associate Justice.—This is an action by the appellee against the appellant for damages on account of the alleged breach of a contract alleged to have been made by appellant with appellee, whereby appellee was to grade and clear the right of way for a railroad track for appellant for a distance of four miles, one mile of which extended from the defendant's track near Clark & Boyce Lumber Company's mill in Marion County on the track of the Missouri, Kansas & Texas Railway Company in Jefferson, and the other three miles being the extension of the railroad in Cass County, near Cave Springs, and running northwesterly three miles, for which appellee was to receive ten cents per yard for moving the dirt and twenty-five dollars per acre for clearing and grubbing the right of way.

Appellant answered in the court below by general denial and specially that it had paid the plaintiff in full for the grading and clearing of the one mile of track in Marion County. As to the three miles in Cass County, the defendant pleaded that it never made any contract with plaintiff therefor; and further, that the plaintiff spent four months in grading and clearing the one mile in Marion County and that it was done in such an unskilfull manner and with so much delay that the defendant did not want him to do the similar work in Cass County, as it was necessary for it to be done promptly and much sooner than plaintiff could or would do same, and that as plaintiff had taken four months instead of one to do the work in Marion County, its business was at a standstill in consequence thereof and that time was material without delaying the completion thereof, all of which was known to the plaintiff.

There was a trial before the court and jury which resulted in a verdict and judgment for appellee in the sum of $650.

Appellant's first assignment of error complains of paragraph 7 of the court's charge to the jury, which, in effect, instructed them that if defendant broke said contract and refused to allow the plaintiff to grade the three miles of road in Cass County, and to grub the right of way, to find for the plaintiff whatever amount he would have made if he had been permitted to do said work. Appellant contends that the instruction was error because the plaintiff, in order to show himself entitled to recover, was required to prove that he was unable to procure other remunerative employment during the time he would have been engaged on the work in Cass County. We do not think this insistence of appellant is sound. The doctrine, that a party is not entitled to recover under a breach of contract for personal services when he obtained other employment equally as remunerative during the period of the contract, does not apply to a case of this kind. This was not a contract for personal services, but to do certain stipulated work which may have been performed by the employes of appellee, and he was entitled to the profits that he would have realized in the event he had caused the work to be performed. Besides, even in cases of breach of contract for personal services, the plaintiff is not required to plead and prove that he had been unable to obtain employment after the breach of the contract in

order to entitle him to recover. He makes out a *prima facie* case by establishing the wrongful breach of the contract, and if his damages can be reduced by showing that he obtained other remunerative employment during the period of the contract breached, it is a matter of defense to be shown by the opposite party. (Porter v. Burkett, 65 Texas, 383; Southwestern Tel. & T. Co. v. Bross, 45 S. W. Rep., 178.)

The court below did not err in refusing to give to the jury appellant's special charges Nos. 1 and 3, because there were no pleadings authorizing these charges; and there was no error in the refusal of the court below to give to the jury appellant's special charge No. 2, as the matter to which it relates was fully covered by the eighth paragraph of the general charge of the court.

We overrule appellant's fifth assignment of error. In our opinion there is no variance between the allegations of appellee's petition and the proof. The petition alleged that there was no specified time as to when the work was to be completed, and there is no testimony in the record showing that there was a specified time agreed upon as to when the work was to be completed. Appellee testified that Clark told him that he wanted him to do the work as quickly as he (witness) could, but it does not appear when he told him this. Clark testified that he was in a hurry for the completion of the work and that he told appellee that he wanted it done quickly and that he was well apprised of that fact; but Clark does not testify that it was a part of the contract that the work should be done as quickly as appellee could do it. Conceding that it was a part of the contract that the work should be done as quickly as appellee could do it, that would not show that it was to be done in any definite or specified time. And further, appellant, having denied that the contract for the three miles in Cass County was made at all, and not having pleaded that if it was made it was breached because appellee failed to perform it within the time agreed upon, is not in a position to take advantage of appellee's failure to comply with that feature of the contract.

Under the pleadings of the parties, there was no issue as to whether or not the work was to be performed in a specified time; the only issue being as to whether the contract was made, and, if so, whether appellee was damaged by the breach thereof.

We discover no reversible error in the record, and the judgment of the court below is therefore affirmed.

Affirmed.

Writ of error refused.

KITTY HAMMOND v. ROSE HAMMOND.

Decided May 23, 1906.

1.—Parol Gift—Will.

In support of a claim of parol gift to a putative wife, evidence that the husband on his death bed handed to her his deeds to the land, which was in their joint possession, saying, "the deeds are yours, and the land," was admissible, though coupled with the declaration, "after I die the land will be yours." It was a question for the jury whether this was intended as a present parol gift (valid) or an attempted parol will (invalid).

2.—Limitation—Registered Deed.

In a controversy over land conveyed to the deceased husband and sought to be recovered by the legal from the putative wife, the latter, asserting a parol gift and limitation, could not avail herself of possession for five years under the registered deed to the husband, since the legal wife claimed under the same deed. Thompson v. Weisman, 98 Texas, 170, distinguished.

3.—Divorce—Presumption.

If the jury were authorized to presume a divorce from the fact of separation and remarriage of the husband six years later with another who thereafter lived with him as his wife, such presumption was not one of law which the court could give in charge to the jury.

Appeal from the District Court of Kaufman County. Tried below before Hon. J. E. Dillard.

Huffmaster & Huffmaster, for appellant.—The court erred in refusing to allow defendant to prove that the deceased, Charles Hammond, in his lifetime made a parol gift of the land in controversy to the defendant, Kitty Hammond, and put her in possession thereof. Keith v. Keith, 13 Texas Ct. Rep., 126; Shepard v. Galveston, H. & H. R. R. Co., 2 Texas Civ. App., 539.

Every intendment of law is in favor of matrimony. The marriage of Kitty Hammond and Charles Hammond by regular license and under the form of law, having been proved, the law raises the presumption of its legality, not only casting the burden of proof upon the party objecting, but requiring him throughout and in every particular to make the fact appear that such marriage is invalid. Nixon v. Wichita, L. & C. Co., 84 Texas, 408; Lockhart v. White, 18 Texas, 109; Johnson v. Simmons, 50 Texas, 537.

Kitty Hammond, having in good faith married Charles Hammond, in due form of law, and never knowing that the divorce between him and Rose Hammond was ever questioned, until the service of process in this suit, nearly 10 years after Charles Hammond's death, is entitled to all the rights of a lawful wife, and being in possession of the land in controversy, can rely on the five years statute of limitation, claiming same under deeds standing in the name of her husband, Charles Hammond. Therefore the court should have submitted the question of limitation to the jury. Thompson v. Weisman, 98 Texas, 170; Fossett v. McMahan, 74 Texas, 548; McLavy v. Jones, 6 Texas Ct. Rep., 492.

J. E. Bass and *Thomas R. Bond,* for appellee.—The court did not err in ruling out the testimony of Dave White because it did not show either a parol gift or sale of the land to the appellant. And further, if in fact such contract as was attempted to be proved by this witness was made, it came within the statute of frauds and was an attempt to abrogate our statute of wills. Newcomb v. Cox, 66 S. W. Rep., 338; Sprague v. Haines, 68 Texas, 216.

To have instructed the jury that the law presumed that appellee and Charles Hammond had been divorced, and authorizing the jury to act on that presumption would have been a charge upon the weight of evidence. Stooksbury v. Swan, 85 Texas, 570.

KEY, ASSOCIATE JUSTICE.—This an action of trespass to try title, involving two tracts of land, one of 40 and the other of 17 acres. The trial resulted in a judgment for the plaintiff for the 40 acre tract, and for one-half of the 17 acre tract, and the defendant has appealed.

Both parties claim title under Charles Hammond, each claiming to be his surviving wife. The verdict of the jury finds that Charles Hammond married Rose, the plaintiff, in 1883; that she lived with him about three years when she abandoned him and lived in adultery with another man; that he brought suit against her for divorce; that the suit was dismissed and no divorce granted; that thereafter in 1892, he married the defendant Kitty, she acting in good faith and believing that he had obtained a divorce from Rose. In 1894, Charles died, leaving Kitty in possession of the land. The proof shows that he left no relatives except the two women, each of whom is now claiming his property as his surviving wife.

The defendant Kitty sought to establish a parol gift from Charles Hammond; and, after proving that he married her and put her in joint possession with himself of the land where she resided with him as his putative wife up to the time of his death, she offered to prove by her son Dave White that a few days before the death of Charles Hammond he requested Kitty to bring him a cigar box out of his trunk which she did, and he took therefrom his land deeds and said: "There are the deeds, the deeds are yours and the land. Settle my debts and no one can bother you." On cross-examination the witness said that when Charles Hammond delivered the deeds to Kitty, he said "After I die, the land will be yours; whenever I die the land becomes yours." Further, on redirect examination he reaffirmed his first statement.

This testimony was objected to and excluded upon the ground that it was insufficient to prove a parol gift, and was an attempt to prove a parol will. We hold that the testimony was admissible, and especially that it should not have been excluded upon the ground that it was insufficient to prove a parol gift. As a general rule, it is not the province of the court to pass upon the sufficiency of evidence to prove a particular issue. If testimony is offered which tends to prove such issue it is admissible, and its sufficiency or probative effect becomes a question for the jury to pass upon. If Charles Hammond placed Kitty in possession of the land, handed her the deeds thereto and said to her: "The deeds and the land are yours," such acts and words on his part tended to show a parol gift of the land. It may be true that he used other language in the same connection tending to show a parol will, which would not be valid; but, as the question is presented, we think appellant was entitled to have the evidence submitted to the jury, and let the jury decide whether or not it was the intention of Charles Hammond to make her a present gift of the property.

We do not think the testimony presents the question of limitation. The suit was brought in less than ten years after the death of Charles Hammond, which eliminates the plea of ten years limitation. The five years statute of limitation is not available, because there was no recorded deed upon which to base that plea. It is true that the deeds to Charles Hammond were recorded before his death, and it was shown that appellant claimed under those deeds; but so did appellee, and if the latter

has any title at all it ante-dates and is superior to appellant's right. In other words, both parties claim the land under the deeds to Charles Hammond, and if appellee has the older and superior right, appellant can not use the very deeds under which the appellee claims as a basis for the five years statute of limitation. In this respect this case is distinguishable from Thompson v. Weisman, 98 Texas, 170.

We overrule appellant's contention to the effect that the court should have instructed the jury that it was a presumption of law that Charles Hammond and his first wife, Rose, had been legally divorced. Whatever might be the right of a jury to indulge such presumption as a matter of fact, we can not sanction the contention that the presumption exists as a matter of law.

The question which is sought to be presented by the second proposition under the sixth assignment of error, is not germain to that assignment, and we pretermit any ruling upon that question. Nor do we express any opinion as to the merit of the case as developed by the testimony.

For the error indicated, the judgment is reversed ond the cause remanded.

Reversed and remanded.

J. E. ROCHE v. J. B. DALE, SR.

Decided May 23, 1906.

1.—Chattel Mortgage—Name.

A chattel mortgage executed by Henry Bethan, but purporting, in the body of the instrument, to be by Henry Bethel, and so indexed, was properly admitted in evidence on proof that the mortgagor was as well known by the latter name as by the former.

2.—Charge—Weight of Evidence.

A charge is not upon the weight of evidence which leaves the jury to determine the facts, but instructs them as to the legal conclusions to be drawn therefrom.

3.—Verdict—Charge.

On the return of a verdict not in the proper form nor responsive to the charge, it was proper for the court to refuse to receive it and to give the jury instructions for its correction.

4.—Charge—Proceeds of Cotton.

A charge with respect to defendant's liability to account for the proceeds of mortgaged "cotton" received by him authorized the jury to consider the liability for the seed as well as for the lint.

5.—Conversion—Receiving Proceeds.

One who participates in the conversion of mortgaged property is liable, whether he received the proceeds or not, and is not entitled to a charge limiting his liability to proceeds received by him.

6.—Landlord and Tenant—Furnishing Team.

A landlord who merely takes up and holds the debt and security given to another by his tenant for a mule purchased by the latter, can not be held to have thereby furnished the mule to him and to have acquired a landlord's lien therefor.

7.—Landlord and Tenant—Mortgaged Property—Conversion.

A landlord who converts mortgaged crops of his tenant is not relieved from liability to the mortgagee by applying the proceeds to the payment of a debt owing by the tenant to him and secured by a mortgage on other property of the tenant, but not by lien on the crop so converted.

8.—Harmless Error.

An appellant can not complain of statements made by the court during the trial, as to the state of the proof as affecting the subsequent order of proceeding, which, if warranted, could have prejudiced only the appellee.

Appeal from the County Court of Fannin County. Tried below before Hon. Tom C. Bradley.

The mortgage admitted in evidence was signed Henry Bethan, but, in the body of the instrument, purported to be the act of Henry Bethel, and was so indexed by the clerk in registering it. There was evidence that the mortgagor was as well known by the name Bethel as Bethan.

The charge complained of in the third assignment held Roche liable for the value of any cotton the jury might find plaintiff entitled to recover of J. R. & R. and which was sold to them by defendant Roche; but there was no recovery against J. R. & R.

Thurmond & Steger, for appellant.—The court erred in admitting in evidence the chattel mortgage objected to from Henry Bethan to J. B. Dale, Sr. Johnson v. Wilson, 137 Ala., 468; Mackey v. Cole, 79 Wis., 426; Rev. Stats., arts. 3327, 3328, 3331, 3334.

The court erred in giving in charge to the jury special charge No. 3 requested by defendants Jones, Rogers and Rogers. This charge was on the weight of the evidence in that it assumes that Roche made the sales of cotton mentioned, and said charge is not framed hypothetically. Gulf, C. & S. F. Ry. Co. v. Finley, 11 Texas Civ. App., 71; Abeel v. McDonald, 12 Texas Ct. Rep., 980.

When the jury returns a verdict which is complete in itself, it is the duty of the court to receive the verdict. The court is not authorized by law to give additional instructions to the jury after he has charged them, unless requested in writing by them. After the jury has returned a verdict it is error for the court to give them additional instructions unrequested, and instruct them over the objections of one of the parties to retire and bring in a second verdict and thereby cause them to render an entirely different verdict, and render judgment on such verdict. Rev. Stats., arts. 1317-1321; Bailey v. Hartman, 12 Texas Ct. Rep., 400; Parker v. Stroud, 12 Texas Ct. Rep., 978.

It is error for the court to render judgment for an item of damage not claimed in the pleadings of the party in whose favor the judgment for such item is rendered, and which said item is not embraced in the elements of damage submitted by the court to the jury. Denison v. League, 16 Texas, 399; Mims v. Mitchell, 1 Texas, 443; Hall v. Jackson, 3 Texas, 305; Martin-Brown Co. v. Pool, 40 S. W. Rep., 820; Texas & P. Ry. Co. v. Frank, 13 Texas Ct. Rep., 236; Worsham v. Vigual, 5 Texas Civ. App., 472.

Where a person is charged with receiving and converting property which is denied by him it is the duty of the court to instruct the jury

that he is not liable for such part of the property as he did not receive. Estes v. McKinney, 43 S. W. Rep., 556; Newman v. Ward, 46 S. W. Rep., 868.

Where a landlord advances money to a tenant to enable him to make a crop on a certain piece of land for a certain year, he has a landlord's lien on the crops so made to secure the payment of such advancement. Rev. Stats. (1903), art. 3235; Newberger v. Heintze, 3 Texas Civ. App., 260; Potter v. Wheat, 53 Texas, 406.

Where a tenant owes a landlord a debt secured by mortgage on property of his other than the crop raised on the landlord's premises and where the tenant has mortgaged the crop to another party and sells all or part of the mortgaged property and pays with the proceeds of the property sold, the landlord so paid is not liable to such third party for the proceeds of the mortgaged property which the landlord has received. Estes v. McKinney, 43 S. W. Rep., 556; Newman v. Ward, 46 S. W. Rep., 868.

After plaintiff had introduced his mortgage on Bethan's crop, and the registration thereof, and had proved by Bethan that he had sold a large part thereof to appellees Jones, Rogers & Rogers after such registration, it was error for the court to state in the hearing and presence of the jury that "There is nothing in the case so far against Jones, Rogers & Rogers for them to introduce evidence." Rev. Stats., art. 1317; Smith v. Dunman, 9 Texas Civ. App., 321; Greif & Bros. v. Seligman, 11 Texas Ct. Rep., 126; Moore v. State, 33 Texas Crim. Rep., 311; Hynes v. Winston, 40 S. W. Rep., 1025; Sargent v. Laurence, 16 Texas Civ. App., 511; Howorth v. Carter, 23 Texas Civ. App., 469.

R. B. Young and *J. G. McGrady,* for appellee.

EIDSON, ASSOCIATE JUSTICE.—This is a suit by appellee, Dale, against Henry Bethan, appellant Roche and Jones, Rogers & Rogers for debt, claimed to be due by Bethan to Dale and alleged to be secured by a chattel mortgage on the crop of cotton raised by said Bethan on Roche's land for the year 1904, a part of which cotton plaintiff alleged had been converted by defendants, and praying for judgment against Bethan for the debt and a foreclosure of said mortgage against the other defendants for the cotton alleged to have been converted by them respectively. Appellant, Roche, answered in the court below, alleging that Bethan owed him for advances to enable him to make the crop, denying a conversion of any part of said cotton and claiming that he had applied all of the proceeds of the cotton received by him to the payment of his claims secured by his landlord's lien. Bethan answered that he had paid Roche all he owed him for advances, and prayed for a judgment over against Roche for value of the cotton which he alleged Roche had converted. Jones, Rogers & Rogers answered denying that they had bought any of the cotton, but if they had bought any they bought it from Roche and prayed for judgment over against Roche for any amount plaintiff might recover against them.

On trial before the court and jury a verdict and judgment was rendered for plaintiff against Bethan for plaintiff's debt against him, with

foreclosure of mortgage, and against Bethan and Roche for $140.61, and that plaintiff take nothing as against Jones, Rogers & Rogers, and judgment was also rendered for Roche against Bethan for $63.70 and foreclosing a mortgage on a certain mule for $41.60. Roche alone has perfected an appeal to this court.

The court below did not err in admitting the mortgage in evidence over the objection of appellant, as shown in his first assignment of error, in view of the fact that it was shown by the evidence that Henry Bethan, the party who executed the mortgage, was as well known by the name of Henry Bethel as by the name of Henry Bethan.

The charge of the court complained of in appellant's third assignment of error is not subject to the objection that it is on the weight of the evidence, as it leaves the jury to determine whether or not the state of facts embraced in the charge existed, before they could find as therein directed. And besides, the jury did not find against appellant under this charge.

There was no error in the action of the court below complained of in appellant's fourth to eighth assignments of error, both inclusive. The verdict returned being informal and not responsive to the charge, it was proper for the court to decline to receive it and to call the attention of the jury to such defects and direct them to correct the same. (Sayles Rev. Stat., arts. 1326, 1327; Oriental Inv. Co. v. Barclay, 64 S. W. Rep., 90.)

Appellant's ninth assignment of error is not well taken. Bethan's pleadings alleged that Roche had disposed of certain cotton in the seed belonging to him and certain bales of cotton and the seed out of same, which he had turned over to Roche to sell, and that he, Roche, had never accounted to him, Bethan, for any of the proceeds thereof. The charge of the court instructing the jury that if they believed from the evidence that defendant Roche received defendant Bethan's half of any of the proceeds of cotton sold from the Bethan crop and had not accounted to Bethan therefor, they should find a verdict in favor of defendant Bethan against defendant Roche for same, was authorized by said pleadings, and the language, "received defendant Bethan's half of any of the proceeds of the cotton sold from the Bethan crop," included the seed of the cotton as well as cotton in bales or lint cotton, and the finding of the jury complained of in this assignment was therefore fully authorized.

There was no error in the action of the court below in refusing to give to the jury the appellant's special charge No. 2, as the subject to which it relates was fully covered by the third paragraph of the general charge of the court; and, besides, the uncontroverted testimony shows that whatever of the mortgaged property was converted to other than its proper purpose, appellant participated in such conversion, and therefore there was no evidence authorizing this special charge.

Appellant's eleventh and sixteenth assignments of error are overruled. The testimony fails to show that appellant furnished the mule to the renter, but after the renter had purchased same on a credit and given his note with a mortgage on the mule to secure the payment thereof, and after the note fell due, appellant paid the note off and had it transferred to him and thereby became the owner thereof with the mortgage to

secure it. This transaction simply constituted a payment of the note to the owner thereof and a procurement of the security held by the original owner of said note, which was the mortgage on the mule, but did not make appellant the owner of the mule so that he could furnish it to the renter.

There was no error in the refusal of the court below to give to the jury appellant's special charges Nos. 6 and 8 as there was no evidence authorizing them. The uncontroverted evidence shows that none of the mortgaged property was sold without the permission of and practical participation in such sale by appellant. He testified that he considered Bethan's cotton practically his own; that he controlled it and that he considered he had a right to hold it and would not permit any of it to be sold without his consent. This being true, appellant would be liable for the conversion of the mortgaged property, although he applied the proceeds to a debt owing him by the mortgagor. The jury having found in favor of appellant for a foreclosure of the mortgage on the mule without stating specifically the amount of the debt secured by the mortgage and the uncontroverted evidence showing such debt to be $41.60, the court did not err in rendering judgment that the mortgage be foreclosed for that amount.

The statement of the trial judge complained of in appellant's eighteenth assignment of error could not affect appellant prejudicially. If anyone could justly complain of said statement, it would be appellee.

The jury found nothing against appellant for any sales made to Jones, Rogers & Rogers. For reasons already stated, appellant's twenty-third assignment of error is overruled.

There was sufficient testimony to justify the jury in finding the item complained of in appellant's twenty-fourth assignment of error. The findings of the court complained of in appellant's twenty-fifth assignment of error was not prejudicial to appellant, as under the law he had no lien upon the mule except that afforded by the mortgage. Appellant's other assignments of error relate to the sufficiency of the testimony to sustain the verdict and judgment. Without discussing it in detail, we are of opinion that the testimony shown by the record is amply sufficient to sustain the verdict and judgment. The judgment of the court below is affirmed.

Affirmed.

Texas & Pacific Railway Company v. J. T. Pemberton.

Decided May 26, 1906.

1.—Grass Burned—Market Value.

Testimony as to what the grass upon land would be worth to the owner for a certain purpose is not evidence of its market value.

2.—Burning Grass—Spark Arresters—Issue.

In a suit for setting fire to grass by sparks from a locomotive, there being no evidence as to the character or condition of the spark arrester on the locomotive, it was error to submit that issue to the jury.

Appeal from the County Court of Midland County. Tried below before Hon. L. M. Murphy.

H. E. Crowley, for appellant.

Camp & Caldwell, for appellee.

STEPHENS, ASSOCIATE JUSTICE.—Appellee sued appellant for the value of grass burned and for injury to the turf on 204 acres of land in Midland County, the date of the fire being August 27, 1904. He was allowed two hundred and thirty-four dollars (besides interest) for the loss of the grass, but was denied any recovery on account of injury to the turf.

The only proof offered of the value of the grass was thus made by witness L. C. Wall:

"(By plaintiff.) 'Is there, or not, a market value for grass here, Mr. Wall, in this country as it stands on the ground?"

"A. 'Yes, sir.'

" 'What would be the market value of that grass on this territory of Mr. Pemberton's that was burned?' "

Defendant objected to the witness answering this question, for the reason that he had not stated that he knew the market value of the grass. Whereupon plaintiff asked the following question:

" 'Do you know, Mr. Wall, what that market value was for the grass on this section, No. 33?"

"A. 'Yes, sir, I have got a pretty good idea.'

" 'What was that market value, Mr. Wall?'

"A. 'On that particular section of land, the number of cattle there, was out there at the time, and what it was used for and was going to be used for, I would take it that that grass was worth anywhere from $1.50 to $2.00 an acre.' "

The defendant objected to said answer: 1. Because the witness had not qualified under the rule sufficiently to authorize him to make such statement.

2. Because the witness goes on to state that this particular grass, for the purpose for which it was used and was going to be used, and the character of cattle that was on it at the time, is the basis for his answer. The witness was not asked any such question, and his answer was not responsive to the question asked, and showed conclusively that it was not based on the market value of the grass.

The witness volunteered the following response to defendant's objection:

"The Witness: 'I do not want to appear as placing myself in a ridiculous position in giving that value to that grass. I wanted to state what kind of cattle that he had out there and what he was using it for.' "

Plaintiff then asked the question:

Q. 'What was the value of the grass on this particular section at the time, Mr. Wall; the market value of the grass?'

A. 'Well, reserving those conditions to myself, I will say that it is from $1.00 to $2.00 per acre; I would say that it was worth $1.50, perhaps not as much as $2.00 per acre.' "

The defendant insisted upon its objections to each and all of said testimony, and moved the court to exclude it from the consideration of the jury, which objection and motion the court overruled.

By another witness offered by appellee the fact that the grass had a market value was proved, but he did not know what it was; and it is evident from what is quoted above that if Wall knew, he did not state it correctly. He undertook to substitute something for market value which was not market value, and the court erred in permitting this to be done. He seemed to be conscious of the fact that he would be placing himself in a ridiculous position to say that wild grass in Midland County in the month of August, 1904, was worth on the market from $1.50 to $2.00 per acre.

Some other rulings complained of are erroneous, but as presented in the brief would not, perhaps, require the judgment to be reversed.

In view of another trial, we suggest that the demurrer to appellant's answer should be overruled; also, if appellant should fail, as on last trial, to offer any proof as to the character of its spark-arresters, that issue should not be submitted to the jury, as was done in the fourth and fifth paragraphs of the charge; and, also, the testimony quoted in the fourth bill of exceptions should not be admitted.

Reversed and remanded.

G. C. STONEMAN v. JOHN S. BILBY.

Decided May 26, 1906.

1.—Tax Suit and Sale—Service by Publication.

In a suit for delinquent taxes the affidavit for service by publication upon a nonresident or unknown owner, required by article 5232o, Sayles' Civil Statutes, is a condition precedent to the court's power to inquire into the merits of the action. A citation by publication is not authorized without such affidavit and a judgment without citation is void.

2.—Judgment—Collateral Attack—Rebuttable Presumption.

While on a collateral attack the presumption will be indulged that an affidavit was filed to authorize the issuance of the citation by publication, still this presumption may be rebutted, unless by doing so the record is in some way contradicted; therefore where the record shows affirmatively an insufficient affidavit the said presumption is overcome.

Appeal from the District Court of Scurry County. Tried below before Hon. W. K. Homan.

H. C. Hughes and *C. P. Woodruff*, for appellant.—In a collateral attack upon a judgment of a court of competent jurisdiction it will be presumed that all necessary steps were taken to enable the court to acquire jurisdiction, and when an affidavit insufficient to warrant the issuance of citation by publication is found in the record, it will be presumed that a proper and sufficient affidavit was made and that jurisdiction was regularly acquired by the court. Hardy v. Beaty, 84 Texas, 562; Iams v. Root, 22 Texas Civ. App., 416; Dickson v. Moore, 9 Texas Civ. App., 520.

When in a trespass to try title case, a defendant relies upon a tax

deed and shows a valid judgment, order of sale and deed, it is the duty of the court trying the case to render judgment in his favor for the title to the land. Kenson v. Gage, 9 Texas Ct. Rep., 725; Crosby v. Bannowsky, 68 S. W. Rep., 47.

Ed. J. Hamner, for appellee.

SPEER, ASSOCIATE JUSTICE.—Appellee instituted this suit in trespass to try title to recover from appellant and another a section of land in Kent County. The defendants pleaded not guilty and the cause was submitted to the court, without the intervention of a jury, who rendered judgment in favor of the plaintiff in the action. The following are the findings of fact made by the trial court, which we adopt: "1. The land in controversy in this suit, being survey No. 2, abstract No. 505, of 640 acres in Kent County, Texas, was patented to W. P. Wilson August 15, 1883, by patent No. 140, in vol. 6.

"Wilson conveyed said land to George S. Roll, by deed dated January 31, 1884; Roll conveyed to O. J. Wiren and F. Cookson by deed dated October 25, 1884. O. J. Wiren conveyed to H. T. Cookson and F. P. Shultz an undivided one-fourth interest in the land, by deed dated April 16, 1887. F. Cookson conveyed by quit claim deed to Dorr Clark and D. C. Plumb, by deed dated March 23, 1895. H. T. Cookson and F. P. Shultz conveyed by quit claim deed, dated January 31, 1895, to Clark and Plumb. Dorr Clark and D. C. Plumb conveyed to Henry G. Weare by deed dated November 20, 1895, this conveyance reciting that the grantee was a resident of Spearefish, South Dakota. A trust deed on the land in controversy was executed by Clark and Plumb to D. T. Bomar June 26, 1895. Clark and Plumb conveyed to Charles L. Ware by deed dated March 1, 1899. Henry G. Weare and John P. Allison conveyed to Charles L. Ware by deed dated March 3, 1899. The Wilkins Land Mortgage Company conveyed the lands in controversy to John S. Bilby, plaintiff in this suit, by deed dated December 5, 1901. Charles L. Ware and the Evans-Snider-Buel Company conveyed this and other lands to plaintiff, John S. Bilby, by deed dated October 31, 1900. Charles L. Ware executed a deed to plaintiff, John S. Bilby, October 2, 1903, for the land in controversy, reciting that this conveyance was made for the purpose of correcting any omission in the description of the land in his previous conveyance to Bilby of March 30, 1900. All the foregoing conveyances were duly acknowledged and placed of record in the deed records of Kent County, Texas.

"2. Suit was instituted in the District Court of Kent County on March 11, 1899, by the county attorney on behalf of the State against 'unknown owner,' to foreclose the lien for taxes on the land in controversy deliquent for the years 1895, 1896 and 1897, aggregating $43.57. The petition in said suit was verified by the affidavit of the county attorney that the averments contained therein are true to the best of his knowledge and belief, but contains no allegation that the owner was a non-resident of the State, or that the owner was unknown and could not be ascertained by inquiry. This petition was on a printed form prepared under the act approved April 13, 1895, and contained the allegation that the delinquent tax record of Kent County, comprising a list of all

lands which had been returned delinquent since January 1, 1885, had been prepared by the comptroller of public accounts; that the land in controversy is embraced therein, and returned delinquent for the taxes since January 1, 1895; that a duplicate of said tax record had been sent to the county clerk of Kent County, and by him recorded in a book styled and labelled 'The Delinquent Tax Record of Kent County,' which was immediately by the clerk certified to the Commissioners' Court of Kent County, published in a newspaper as required by law, and that said court had filed a list of all of said lands so advertised for taxes, including the land in controversy, and caused this suit to be filed. A notice in substantial compliance with the requirements of article 5232o, Sayles' Revised Statutes, addressed to 'unknown owner' and to all persons owning or having or claiming any interest in the land in controversy, was issue on the date of the institution of the suit, and duly published.

"On October 10, 1899, the State filed its first amended original petition in the tax suit, which was the same in all respects as the original petition, except that it alleged that the delinquent tax record had been prepared by the *tax collector of Kent County,* under the provisions of an amended Act 'as enacted by the regular session of the Twenty-fourth Legislature,' that said delinquent tax record had been certified by *the county judge of Kent County,* and delivered by the tax collector to the county clerk, who caused a duplicate thereof to be sent to the comptroller of public accounts.

"On the same date of the filing of this amended petition a judgment was rendered in favor of the State, against 'unknown owner' for the sum of $44.63 taxes due on the land in controversy, adjudging a lien in favor of the State for the amount of taxes, interest and cost, and foreclosing the same—directing the issuance of an order of sale, and that the officer making the sale execute a deed to the purchaser thereat, subject to the right of the defendant to redeem the land within two years from the date of the sale by paying to the purchaser double the amount of money paid by him therefor, and that said order of sale should have the force and effect of a writ of possession as between the parties to the suit or anyone claiming under the defendant, and that the officer place the purchaser in possession of the land within thirty days after the day of sale.

"Order of sale was issued under this judgment on November 8, 1899, and the land sold to the defendant, J. Renfro, on December 5, 1899, for the sum of $80, and the order of sale returned June 9, 1900. A deed was executed by N. N. Rodgers, sheriff of Kent County, the officer making the sale, on December 5, 1899, to the defendant, J. Renfro, for the land in controversy, conveying all the estate, right, title and interest which the said 'unknown owner' had on November 8, 1899, or at any time afterwards, in the land, subject, however, to defendant's right to redeem the land within two years after the date of sale by paying to the purchaser double the amount of money paid by him therefor, which deed was duly acknowledged and recorded in the deed records of Kent County.

"3. J. Renfro conveyed to defendant G. C. Stoneman, by deed dated January 28, 1901, the land in controversy, which deed was duly acknowledged and recorded.

"4. Defendants have held possession of the land claimed by them,

from the dates of their respective conveyances, and have made improvements thereon of the character and to the amount as claimed in their petition. No proof has been made in this case of the value of the land without such improvements, or its value with the improvements.

"5. At the time of the institution of the tax suit against 'unknown owner,' in the District Court of Kent County, to wit: March 11, 1899, the records of deeds of Kent County showed the legal title of the land in controversy to be in Henry G. Weare of Spearfish, South Dakota, and I find that the county attorney of Kent County could have ascertained the name and residence of the owner of said land at the time of the institution of the tax suit, by reference to the deed records of Kent County.

"6. In the judgment of foreclosure rendered in the tax suit on October 10, 1899, there was no recital of notice to or service upon the defendant in that suit, but said judgment recited that the defendant appeared by an attorney appointed by the court to represent the defendant, and I find that the record in said tax suit shows no affidavit by the county attorney that the defendant in that suit was a non-resident of the State, or that the owner of said land was unknown and could not be ascertained by inquiry.

"7. The present suit was instituted on March 26, 1902."

It is sufficient for an affirmance of the judgment if we sustain any one of the three conclusions of law made by the trial judge, and this we do. The findings show that the judgment of foreclosure rendered in the tax suit contained no recital of notice to, or service upon, the defendant in that suit, and that the petition, although sworn to by the county attorney representing the State, contained no allegation that the owner was a nonresident of the State, or that the owner was unknown and could not be ascertained by inquiry. Supplementing the findings of the trial court, we further find that the original petition in the foreclosure suit contained the allegation "that the defendant's place of residence is unknown to plaintiff." The question first arises, does the failure to file the affidavit for service by publication, as required by article 5232o, Sayles' Civil Statutes, affect the jurisdiction of the court to proceed to judgment in the case? That article, so far as pertinent to the inquiry, reads: "Wherever the owner or owners of any lands or lots returned delinquent or reported sold to the state, or that may hereafter be reported sold or returned delinquent for the taxes due thereon for any year or number of years, are nonresidents of the State, or the name of the owner or owners of said land or lots be unknown, then upon affidavit setting out that the owner or owners are nonresidents or that the owner or owners are unknown to the attorney for the State and after inquiry cannot be ascertained, said parties shall be cited and made parties defendant by notice," etc. We think it is to be understood from this language that as a condition precedent to the court's power to inquire into the merits of the action, the affidavit provided for must have been filed. In other words, a citation by publication is not authorized except upon the filing of such affidavit, and of course a judgment without citation may be shown to be invalid if properly attacked. The following authorities appear to treat such omission as a jurisdictional defect: Hardy v. Beaty, 84 Texas, 562; Iams v. Root, 22 Texas Civ. App., 416; Pennoyer v. Neff, 95 U.

S., 714; Coons v. Throckmorton, 25 Ark., 60; Allen v. Smith, 25 Ark., 495; People v. Pearson, 76 Cal., 400, 18 Pac. Rep., 424; Bardsley v. Hines, 33 Ia., 157; Jeffreys v. Hands, 37 Ky., 89; Murdoch v. Hillyer, 45 Mo. App., 287; Gilmore v. Lampman, 91 A. S. R., 376; Beckett v. Cuenin, 22 Am. St. Rep., 399.

This brings us to a consideration of the further question whether or not the failure to file a proper affidavit in the original tax foreclosure suit, can be shown in this, since the attack is collateral. We are not unmindful of the rule laid down in the Texas cases above cited, to the effect that on collateral attack the presumption is that a sufficient affidavit was filed to authorize the issuance of the citation by publication. But we understand the rule to be that this is a rebuttable presumption unless rebutting it involves in some way the contradiction of the record. As before shown, the judgment does not recite the filing of an affidavit or service upon the defendant in the action, but on the contrary the record does affirmatively show an insufficient affidavit (the sworn petition), and in such case the inference is that the service was had upon the defective affidavit, the only one in the record, and the presumption above referred to is therefore overcome. This we understand to be the application of the exact rule announced by us in the cases of Earnest v. Glaser, 7 Texas Ct. Rep., 712; Babcock v. Wolffarth, 10 Texas Ct. Rep., 164; in each of which cases a writ of error was refused.

Holding as we do in these respects, we affirm the judgment of the District Court irrespective of his other conclusions of law, which we find it unnecessary to decide or even to discuss.

Affirmed.

Writ of error refused.

Texas & Pacific Railway Company v. J. G. Bump.

Decided May 26, 1906.

1.—Verdict—Preponderance of Evidence.

A mere preponderance of evidence against a verdict will not authorize an Appellate Court to set it aside in the absence of anything in the record showing that it was the result of passion or prejudice.

2.—Riding on Freight Train—Assumed Risk—Charge.

In a suit by plaintiff for personal injuries received while riding on a freight train in charge of stock, charges considered, and held to sufficiently and correctly present the law as to the risk assumed by plaintiff.

Appeal from the District Court of Palo Pinto County. Tried below before Hon. W. J. Oxford.

H. C. Shropshire, for appellant.—A shipper going along with his stock, and riding upon a freight train, is deemed to assume such risk of dangers as necessarily attend the kind of train on which he is riding, and if he is injured, while so riding upon said freight train, from dangers such as are incident to travel upon such a train, he can not recover for such injuries and it was error for the court to refuse to so instruct the jury. Runnels et al. v. Houston, E. & W. T. Ry. Co., 50 S. W.

Rep., 172; Wait v. Omaha, K. C. & E. Ry. Co., 65 S. W. Rep., 1028; Erwin v. Kansas, Ft. S. & M. Ry. Co., 68 S. W. Rep., 88; Omaha & R. V. Ry. Co. v. Crow, 74 N. W. Rep., 1066; Oliver v. Moore, 43 S. W. Rep., 812; Missouri, K. & T. Ry. Co. v. Cardena, 54 S. W. Rep., 312; Whitsett v. Miller, 1 Posey U. C., 212, 213; Smith v. Frio County, 50 S. W. Rep., 958; Banner Distilling Co. v. Dieter, 60 S. W. Rep., 798; Blair v. Blanton, 54 S. W. Rep., 321; Jones v. Parker, 42 S. W. Rep., 123; Eppstein v. Thomas, 44 S. W. Rep., 893.

W. H. Penix, for appellee.

CONNER, CHIEF JUSTICE.—In this suit appellee recovered in the District Court of Palo Pinto County two hundred and eighty dollars as damages for personal injuries, and the further sum of four hundred and twenty dollars as damages to two carloads or fifty-five horses. It was alleged that the horses were shipped over appellant's line of railway from Strawn, Texas, to Texarkana, Texas, on October 25, 1902; that one of said cars was defective in particulars mentioned; that when near the city of Marshall and while running at a rapid rate of speed, by reason of negligence on the part of appellant, a collision or very sudden stoppage occurred which proximately resulted in great injuries to said horses as particularized, and also caused great and severe injuries, as specified, to the person of appellee, who accompanied said shipment. The prayer was for the total sum of $1,335, with judgment as stated.

While the first assignment seems subject to appellee's objection that it contains three distinct subjects or grounds of error, but a single subject is thereunder presented and we will consider it. Under this assignment appellant urges that a new trial should have been granted, as was sought, because a preponderance of the evidence shows that appellee was not personally injured, and that hence the verdict was excessive to the extent, at least, of the amount awarded on this account. A mere preponderance of evidence against a verdict will not authorize us to set it aside. The rule is well established that where there is evidence tending to support a verdict, and nothing appears in the record showing that it was the result of passion or prejudice, it will not be set aside. (Ft. Worth & Denver Ry. Co. v. Bunrock, 46 S. W. Rep., 70; Louisville Ry. Co. v. Casey, 71 S. W. Rep., 876; Board of Councilmen of City of Frankfort v. Chinn, 89 S. W. Rep., 188.) Appellee testified to the sudden stoppage of the train; that it threw him off his seat backwards and against the caboose door; that it was very dark and that he could not see what was the trouble; that the train was running rapidly; that he struck on his head and shoulders; hurt his head, neck, shoulders, back and wrist of left hand; that he was sixty-two years of age; for four weeks thereafter was hardly able to get on a horse; that his back and neck were bruised; that his back had never got well, but still hurt him; that he treated himself for over a month; that the injuries disabled him with reference to doing manual labor; that from the time of the injury until the time of the trial he had not been able to pitch hay or do any work of that character with his left hand or wrist, etc. Other witnesses testified to the sudden stopping of the train and of complaints of injury by appellee, and while there is evidence tending to show that he thereafter rode and attended to

his horses, we think the evidence referred to sufficient to support the verdict in the particular attacked.

The second and last assignment of error is to the court's refusal of the following special charge requested by appellant, viz.: "Gentlemen of the jury, in this case you are charged: In going upon and riding in the caboose of the defendant's freight train plaintiff assumed the risk of injury from all dangers incident to travel upon said freight train, and if you find and believe from the evidence that plaintiff was injured, if injured, only from dangers incident to travel upon said freight train, you will not allow plaintiff any damages on account of any personal injuries, if any, he may have sustained while riding in said caboose as alleged." It is perhaps doubtful whether the evidence raises the defense embodied in this special charge, but if so, we think the court otherwise sufficiently and more correctly presented it. For instance, in the ninth paragraph the jury were instructed "that in riding upon a freight train the plaintiff assumed the risks ordinarily incident to the operation of freight trains, and owed to himself the duty to take such a degree of care, prudence and foresight to protect himself from injury (degree of care referred to being that of ordinary care), and if you believe from the evidence that plaintiff failed to exercise such care and prudence for the protection of his person against injury while riding upon said train, and if such failure on his part contributed to his injuries, if any, then he can not recover for injuries to his person." And again, at the request of appellant, the court gave the following special charge, viz.: "Gentlemen of the jury, in this case you are charged unless you find and believe from the evidence before you that plaintiff was injured, if injured, from danger other than such dangers as are incident to travel upon a freight train, you will not allow plaintiff any damages on account of any injuries, if any, he may have personally sustained while riding upon the caboose of defendant's freight train."

No other question is presented and the judgment will be affirmed.

Affirmed.

Writ of error refused.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS v. W. J. GENTRY.

Decided May 26, 1906.

Johnson Grass—Railroad Right of Way—Penalty—Constitutional.

That part of the Act of April 18, 1901, fixing a penalty for railroad companies permitting Johnson grass to go to seed on their right of way is constitutional and can be enforced notwithstanding the clause providing for a recovery of damages in addition to such penalty is unconstitutional.

Appeal from the District Court of Henderson County. Tried below before Hon. B. H. Gardner.

E. B. Perkins, Frost, Neblett & Carpenter and *W. R. Bishop,* for appellant.—"It is settled law, and now a familiar rule, that where a statute contains an unconstitutional provision, and another, which, if stand-

ing by itself, would be valid, the latter will be given effect, provided they are so clearly independent of each other that the court can say that the Legislature would have passed it if the former had been omitted. On the other hand, if they be so connected one with the other, that it is apparent that the Legislature would not have passed the act, except as a whole, then the entire statute must fall." San Antonio P. Ry. Co. v. Burns, 87 S. W. Rep., 1144; Gulf, C. & S. F. Ry. Co. v. Stokes, 14 Texas Ct. Rep., 356; Texas & P. Ry. Co. v. Mahaffey, 84 S. W. Rep., 648; United States v. Reese, 92 U. S., 214; Baldwin v. Franks, 120 U. S., 678; Ex parte Towles, 48 Texas, 413; State v. Duke, 42 Texas, 455; State v. Donusman, 28 Wis., 541; Slauson v. Racine, 13 Wis., 398; Spraigue v. Thompson, 118 U. S., 90; Western Union Tel. Co. v. State, 62 Texas, 630.

No brief for appellee.

BOOKHOUT, ASSOCIATE JUSTICE.—Appellee, W. J. Gentry, instituted this suit in the Justice Court of Henderson County, on August 18, 1904, against appellant to recover $25 as a penalty for permitting Johnson grass to mature and go to seed on appellant's right of way where the right of way of said appellant passed through appellee's farm. The case was tried in the Justice Court on the 29th of August, 1904, resulting in a judgment in favor of appellee for the sum of $25 and costs of suit.

The case was appealed by appellant to the District Court of Henderson County on September 4, 1905, and was tried in said District Court, resulting in a judgment in favor of appellee. Motion for new trial was presented and overruled. And the case is now before this court on appeal, which was perfected by filing appeal bond October 20, 1905.

Opinion.—Under its second and third assignments of error, which are grouped, appellant presents the following propositions:

1. So much of the Act of the Twenty-seventh Legislature of the State of Texas approved April 18, 1901, General Laws of the State, pages 283, 284, prohibiting railroad and railway companies from permitting Johnson grass to go to seed upon the right of way and fixing the penalty therefor, as undertakes to impose damages in addition to the penalty against such railroad and railway companies is unconstitutional, because the subject of damages is not mentioned or provided for in the caption of the Act.

2. It being evident that the Legislature would not have passed the Act fixing a penalty for allowing Johnson grass to go to seed on the right of way of railroad companies without the provision allowing damages in addition to the penalty, and that part of the bill allowing damages being unconstitutional the whole bill should be declared unconstitutional and nonenforcible.

The Act of the Legislature referred to and now complained of is found on pages 283 and 284 of the General Laws of the State passed and approved on the 18th of April, 1901, and is substantially as follows:

An Act to prohibit railroad and railway companies or corporations in this State from permitting Johnson grass or Russian thistle from going to seed upon their right of way, and fixing a penalty.

Section 1. Be it enacted by the Legislature of the State of Texas:

It shall hereafter be unlawful for any railroad or railway company or corporation doing business in this State to permit any Johnson grass or Russian thistle to mature or go to seed upon any right of way, owned, leased or controlled by such railroad or railway company or corporation in this State.

Section 2. If it shall appear upon the suit of any person owning, leasing or controlling land contiguous to the right of way of any such railroad or railway company, or corporation, that said railroad or railway company or corporation has permitted any Johnson grass or Russian thistle to mature or go to seed upon their right of way, such person so suing shall recover from such railroad or railway company or corporation the sum of twenty-five dollars, and any such additional sum as he may have been damaged by reason of such railroad or railway company or corporation permitting Johnson grass or Russian thistle to mature or go to seed upon their right of way. Provided, any owner of land, or any person controlling land contiguous to the right of way of any such railroad or railway company, who permits any Johnson grass or Russian thistle to mature, or go to seed upon said land, shall have no right to recover from such railroad or railway company as provided for in this Act. Approved April 18, 1901.

The constitutionality of the Act under consideration was challenged by general and special exceptions in the District Court. These exceptions were overruled. So much of the Act as attempts to provide for damages in addition to the penalty has been held by the courts to be unconstitutional, because the caption of the Act was not sufficiently broad to admit of legislation on damages. (San Antonio & A. P. Ry. Co. v. Burns, 87 S. W. Rep., 1144; Gulf, C. & S. F. Ry. Co. v. Stokes, 14 Texas Ct. Rep., 356.)

Article 3, section 35, page 78, Axtell's Constitution of 1876, contemplates that only the unconstitutional feature in a bill shall be eliminated, and that the remainder of the Act may stand. But appellant insists that it is apparent that the Legislature would not have passed the Act fixing a penalty for allowing Johnson grass to go to seed on the right of way of railroad companies without the provision allowing damages in addition to the penalty, and that part of the bill allowing damages being unconstitutional the whole bill should be so declared. We are of the opinion, as contended by appellant in argument, that it is evident the bill as originally introduced in the Legislature did not embrace the damage feature, but this was added by amendment. The evident purpose of this part of the statute was to make it plain that the Legislature by making it unlawful for a railway company to permit Johnson grass to mature and go to seed on its right of way and fixing a penalty for its violation, did not intend to do away with the remedy of one injured thereby to maintain a suit for his damages. On March 10, 1906, this court, in the case of Railway Company v. Terhune, in an opinion by Chief Justice Rainey, sustained a recovery against the railway company for damages resulting from its permitting Johnson grass to go to seed on its right of way and causing the same to be washed upon the land of appellee. As we view it, the damage feature of the statute only made statutory the remedy existing at common law, and the fact that this part of the statute is unconstitutional does not materially change the

remedy existing to prevent the spread of Johnson grass. We do not concur in the proposition that the Legislature would not have passed the statute fixing a penalty for allowing Johnson grass to go to seed upon the right of way of railroad companies without the provision allowing damages in addition to the penalty. It is clear that if the unconstitutional part of the statute is stricken out that which remains is complete in itself and capable of being executed in accordance with the apparent intent of the Legislature.

We are of the opinion that the part of the statute fixing a penalty for railroad and railway companies and corporations permitting Johnson grass to go to seed on their right of way is constitutional and should be enforced, notwithstanding the clause providing for a recovery of damages in addition to such penalty is unconstitutional. The judgment is affirmed.

Affirmed.

Writ of error refused.

F. H. LUMMUS SONS & COMPANY v. H. A. WADE.

Decided May 28, 1906.

Justice Court—Judgment by Default—Setting Same Aside.

At the request of plaintiffs a justice of the peace rendered a judgment by default against the defendants. On the same day, upon motion of defendants setting up good cause, the justice set aside the judgment by default, over the protest of plaintiff's attorney on the ground that plaintiff was entitled to a full day's notice of said motion. Held, while the action of the justice was irregular, it was not void. Rev. Stats., art. 1651, construed. Aycock v. Williams, 18 Texas, 393, and Smith v. Carrol, 4 Texas Ct. Rep., 295, distinguished.

Appeal from the District Court of Leon County. Tried below before Hon. Gordon Boone.

C. D. Gustavus, for appellant.—A justice of the peace has no authority to grant a new trial except upon written motion and after one full day's notice of the motion is given to the opposite party or their attorney of record. After final judgment his jurisdiction over the parties and cause ceases, and can only be reacquired upon motion in writing for a new trial and by giving one full day's notice of the motion to the adverse party or their attorney or record. Rev. Stats., 1895, arts. 1652 and 1654; Aycock v. Williams, 18 Texas, 393; Smith v. Carrol, 4 Texas Ct. Rep., 295.

GILL, CHIEF JUSTICE.—F. H. Lummus Sons & Company brought this action against H. A. Wade, a justice of the peace, to compel him by mandamus to issue an execution on a judgment by default rendered by him in favor of plaintiffs against A. and R. F. Emanuel. Upon a hearing on the merits the trial court denied the relief sought, and plaintiffs have appealed.

The undisputed facts upon which this suit is predicated are as follows:

Appellants sued A. and R. F. Emanuel before H. A. Wade, a justice

of the peace, to recover upon two promissory notes for $43 each. The defendants therein filed their plea in reconvention for damages, and on January 22, 1904, there was a mistrial, the jury failing to agree on a verdict. At the February term of the Justice Court in which the cause was pending, the amended complaint of plaintiffs was stricken out on motion of defendants, and the cause was submitted to the jury on the amended plea in reconvention. The defendants during the trial asked leave to withdraw their announcement of ready in order to amend further, which was granted on condition that plaintiff have a continuance.

On March 25, 1904, at the succeeding term of the Justice Court plaintiffs' attorney appeared before the justice at 10 a. m. sharp and the amended plea of defendants not being in, demanded a judgment by default upon the statement of his claim entered upon the justice's docket. The notes sued on were with the papers in the hands of defendants' attorneys, and no evidence was introduced. Neither defendants nor their attorneys were present, nor did they know of plaintiffs' purpose to call the case prior to 1 o'clock, the time which defendant claimed had been agreed on. The justice rendered judgment by default for the amount of plaintiffs' claim. A jury had been demanded by defendants and the jury fee paid. It is this judgment upon which plaintiffs seek to compel the issuance of execution. The application is based upon the following facts:

Defendants' attorneys appeared with their amended plea in reconvention at 1 o'clock, and learning that judgment had been entered, at once filed a motion to set aside the judgment by default, setting up facts which this record sustains and which required the judgment to be set aside. The plaintiffs' attorney was present and protested against the hearing of the motion on the ground that plaintiffs had not had one full day's notice of the motion as required by law. The justice ignored the protest, heard the motion, set aside the default judgment, and called the case for trial as per the alleged agreement of that morning. Plaintiffs' attorney refused to participate in the trial and defendant had judgment.

The two points made by plaintiffs upon this state of facts are:

First. That the order setting aside the judgment by default is a nullity because plaintiffs were not given one day's notice thereof as required by law, and

Second. The judgment rendered by the justice in favor of defendants is a nullity because the statute forbids the retrial of the cause at the same term at which the new trial was granted.

Article 1651 of the Revised Civil Statutes provides: "Any justice of the peace shall have power at any time within ten days after the rendition of a judgment by default or dismissal to set aside such judgment on motion in writing for good cause shown, supported by affidavit. Notice of such motion shall be given to the opposite party at least one full day prior to the hearing thereof."

Article 1654 is as follows: "Where a judgment is set aside or a new trial granted the cause shall be continued to the next regular term, unless otherwise agreed by the parties with the consent of the justice."

It was held in Aycock v. Williams, 18 Texas, 393, that after a justice

of the peace had rendered judgment in a cause pending before him his jurisdiction ceased until further invoked by a motion for a new trial, and that if such motion was granted without notice to the opposite party, the judgment was a nullity. Smith v. Carrol, 4 Texas Ct. Rep., 295, is to the same effect.

We think, however, the case before us is distinguishable from those cases. Here the jurisdiction was reinvoked by the motion, and the plaintiffs' attorney was actually present in court. There was therefore actual notice and the presence of the parties. The action of the justice, while irregular, was not void. (1 Black on Judgment, sec. 85.) The facts upon which the motion was predicated are not disputed.

The action of the court in retrying the cause at the same term is not before us, as the second judgment is not here brought in question.

We think the judgment should be affirmed and it is so ordered.

Affirmed.

E. E. PIPKIN v. HAYWARD LUMBER COMPANY.

Decided May 28, 1906.

Question of Fact—Peremptory Charge—Error.

While plaintiff was ascending a ladder from one floor to another of defendant's building in the prosecution of his duties, the ladder was tilted and caused to fall by certain hoisting machinery in use on the building, whereby plaintiff was injured. The weight of the testimony showed that a stairway had been completed between the two floors, and plaintiff must have known it, and there was some testimony that the men were ordered not to use the ladder any more, but plaintiff denied knowledge of this order. The evidence tended to show that the men continued to use the ladder after the completion of the stairway. Held, it could not be assumed as matter of law that plaintiff knew the danger and assumed the risk of using the ladder while the hoisting machinery was in operation, nor that he was guilty of contributory negligence in using the ladder, knowing that the stairway was completed, and therefore the court erred in giving a peremptory charge for defendant.

Appeal from the District Court of Nacogdoches County. Tried below before Hon. James I. Perkins.

Blount & Garrison, for appellant.—To authorize the court to peremptorily instruct the verdict the evidence must be of such character that there is no room for ordinary minds to differ as to the conclusions to be drawn from it, and such a charge should never be given when there is any testimony whatever upon which a verdict can be predicated. Hatch v. Pullman Co., 11 Texas Ct. Rep., 757; Stephenson v. Pullman Co., 26 S. W. Rep., 112; Wallace v. Southern Oil Co., 91 Texas, 22; Brown v. Galveston, H. & S. A. Ry. Co., 59 S. W. Rep., 930; Texas & P. Ry. Co. v. Crockett, 3 Texas Ct. Rep., 797; Hightower v. Grey, 11 Texas Ct. Rep., 392; Quinn v. Galveston, H. & S. A. Ry. Co., 11 Texas Ct. Rep., 820; Gulf, W. T. & Pac. Ry. v. Smith, 11 Texas Ct. Rep., 571; Galveston, H. & S. A. Ry. v. Manns, 11 Texas Ct. Rep., 763.

Ingraham, Middlebrook & Hodges, for appellee.—The court did not err in peremptorily instructing a verdict for the defendant; because,

"A mere scintilla of evidence or a mere surmise that there may have been negligence on the part of defendant clearly would not justify the trial judge in leaving the case to the jury; there must be evidence upon which they might reasonably and properly conclude that there was negligence." Galveston, H. & S. A. Ry. Co. v. Faber, 77 Texas, 153; Flores v. Atchison, T. & S. F. Ry. Co., 66 S. W. Rep., 709; Rio Grande & E. P. Ry. Co. v. Lynch, 66 S. W. Rep., 712; Sanches v. San Antonio & A. P. Ry. Co., 88 Texas, 117; Galveston, H. & S. A. Ry. Co. v. Ryon, 80 Texas, 61; McDonald v. International & G. N. Ry. Co., 86 Texas, 1; Galveston, H. & S. A. Ry. Co. v. Ryon, 70 Texas, 58.

REESE, ASSOCIATE JUSTICE.—E. E. Pipkin sued the Hayward Lumber Company to recover damages for personal injuries alleged to have been caused by falling from a ladder, upon which he was going from the lower to the upper story of their mill in the prosecution of his work as an employee of the lumber company. Upon the trial the court instructed a verdict for the defendant, and from the judgment plaintiff appeals.

It was alleged in the petition that at the time of the accident appellant, who had come down from where he was at work on the second floor of the building, was returning to his work on the second floor using for the purpose a ladder which had been provided by appellee for that purpose. Other employes of appellee were engaged at the same time in hoisting certain heavy timbers to the upper floor by means of blocks and ropes, operated by a steam engine. This rope coming from a snatch-block on the upper floor, passed through a snatch-block at the north end of the building, about six feet east of the center of the building, and thence was carried to and through a similar snatch-block near the center of the building from north to south, and about six feet east of the center from east to west. From this snatch-block the rope was carried east to the engine at the east side of the building. The snatch-block at the north end of the building was so fixed as to have from one and a half to two feet play, and when taut the rope passing through this snatch-block would rise that distance from the floor at that point. The building was 180 feet long from north to south and 40 feet wide from east to west. The ladder, upon which appellant was ascending at the time of the accident, was near the center of the building on the east side, with the upper end resting upon the upper sill and the lower end upon the floor and about six inches from the rope as it ran between the snatch-blocks. While appellant was upon the ladder and near the top, the man in charge of the hoisting apparatus gave a signal which put the machinery in motion. The tightened rope between the snatch-blocks in some way caught under the bottom part of the ladder tilting it over and causing appellant to fall to the floor beneath, inflicting upon him the injuries of which he complains.

It was in proof that the ladder was fastened both at the top and bottom and had been provided by appellee for the use of the men in going from the lower to the upper floor, but that a substantial stairway had been erected for that purpose. The great weight of the evidence shows that this stairway had been finished two or three days before the

accident, but there was evidence tending to show that the men continued to use the ladder up to the time of the accident to appellant. The evidence was contradictory as to whether appellant had ever used the stairway, but the circumstances show that he must have known that it had been completed. There was some testimony that after the completion of the stairway, the ladder was ordered to be removed and the men told not to use it any more, but to use the stairway. Appellant denies having heard or known of these orders, and there is evidence tending to show that the men continued to use the ladder as if the stairway were not there.

Evidence introduced for appellee tended to show that the ladder was an unsafe means for ascending to the upper floor, and that the foreman knew this fact.

It can not be assumed as matter of law that the danger of going upon the ladder while the hoisting machinery was in operation was so obvious that appellant must have known the danger, or that he, in fact, did know it, and assumed the risk of going upon the ladder at the time. It can not be assumed as matter of law, from the evidence, that appellant, knowing that the stairway had been completed, was guilty of contributory negligence in using the ladder. If the ladder was an apparently safe means of getting to the upper floor and had been allowed to remain and to continue to be used by the men with the knowledge of the foreman in charge of the work, it can not be said as matter of law that appellant either assumed the risk attendant upon its use instead of the stairway, or was guilty of contributory negligence in so using it.

We think the trial court erred in taking the case from the jury, and it should have been submitted to them upon the issues made by the pleadings, of negligence of the master in providing an unsafe place to work, and of assumed risk and contributory negligence on the part of the appellant.

The judgment is reversed and the cause remanded.

Reversed and remanded.

M. E. LORING, GUARDIAN, v. SARAH JACKSON ET AL.

Decided May 29, 1906.

1.—Application for Continuance—Discretion of Court.

An application for continuance to procure testimony to rebut testimony offered by the opposite party is addressed to the discretion of the court, and when the testimony offered by the opposite party is withdrawn the application for continuance is properly overruled.

2.—Forgery—General Reputation.

Evidence is admissible that a grantor in a deed bore the general reputation in the community in which he lived and about the date of the alleged forgery, of a forger of land titles.

3.—Trial Without Jury—Improper Testimony.

It is not improper for the court in a trial without a jury to hear testimony in order to determine its admissibility.

4.—Forgery—Impress of Seal—Testimony.

As a circumstance tending to show that a paper purporting to be a certified copy of a deed was a forgery, it was proper to admit in evidence certain instruments proven to be genuine which bore the impression of the seal used by the same county clerk about the same time to show by comparison a difference in the impress of the seal, and to allow a witness to testify that he had examined a number of like old certificates of said clerk and that they all bore the impress of the same seal as the genuine instruments.

5.—Forgery—Innocent Purchaser.

One claiming under a forged deed can not be an innocent purchaser.

6.—Finding of Fact—Circumstantial Evidence.

A finding of fact may be supported by a combination of slight circumstances, no one of which taken alone would be sufficient. Evidence as to forgery considered and held sufficient.

7.—Limitation—Water Barriers—Cases Distinguished.

The enclosure of a tract of land partly by fence and partly by impossible water barriers or courses is sufficient to support the statute of limitation if the natural barriers are so used in connection with the fences as to indicate that they are relied upon to enclose the land. Facts considered and distinguished from the facts in Polk v. Beaumont Pasture Co., 64 S. W. Rep., 61, and Vineyard v. Brundrett, 42 S. W. Rep., 232.

Appeal from the District Court of Chambers County. Tried below before Hon. L. B. Hightower.

Robertson & Whitaker, D. M. Reedy and *F. J. McCord,* for appellant. —To warrant the court in refusing to grant a continuance on an application (which is otherwise good and so held by the court) on account of the absence of material evidence, the opposing party must admit the truth of what is proposed to be proved. Maughmer v. Bering, 46 S. W. Rep., 917.

The failure of a witness to answer a material question is ground for suppressing his deposition. Houston & T. C. Ry. Co. v. Shirley, 54 Texas, 142; Lee v. Stowe, 57 Texas, 451; Davis v. McCartney, 64 Texas, 589; Coleman v. Colgate, 69 Texas, 90; New York T. & M. Ry. Co. v. Green, 90 Texas, 263.

The general rule is that in a civil action, the character of neither party thereto, nor of any other person connected with the transaction, is involved, and it can not be made the subject of inquiry, and even where some person connected with the transaction involve in the suit, is charged with fraud or moral delinquency, will not result in allowing evidence of character to be admitted. Redus. v. Bunett, 59 Texas, 582; 5 Am. and Eng. Ency. of Law, pp. 861 and 863; Norris v. Stewart, 105 N. C., 455; S. C. 18 Am. St. Rep., 917; Rankin v. Busby, 25 S. W. Rep., 679; 1 Greenleaf's Ev., secs. 54 and 55.

A copy of a conveyance of land situated in Liberty County, which is archived in Nacogdoches County, although proved and recorded afterwards in the county where the land lies is not admissible as a recorded instrument. Frost v. Wolf, 77 Texas, 459.

The instruments in question not being properly recorded or archived, examined copies of the original were not admissible in evidence without proof of the execution of the originals. Rev. Stats., art. 2306; Frost v.

Wolf, 77 Texas, 459; Smith v. Gillum, 80 Texas, 120; Heintz v. Thayer, 92 Texas, 664.

A certified or examined copy would only be admissible where the original transfer would, if produced, come from proper custody, and on account of its antiquity and long assertion of title by those claiming under it, would be admissible without proof of execution. Hill v. Templeton, 29 S. W. Rep., 537.

The mere occupancy of land by grazing livestock upon it, without substantial enclosures or permanent improvements, is not sufficient to support a plea of limitation under our statute. Fuentes v. McDonald, 85 Texas, 132; Tarlton v. Kirkpatrick, 21 S. W. Rep., 405; Whitehead v. Foley, 28 Texas, 291.

Exclusive claim without concurrent adverse possession, or adverse possession without concurrent exclusive claim is not sufficient to support the statutes of limitation. Mosely v. Withie, 26 Texas, 720; Mhoon v. Cain, 77 Texas, 317; Craig v. Cartwright, 65 Texas, 424; Schleicher v. Gatlin, 85 Texas, 272.

Hugh Jackson and *A. D. Lipscomb,* for appellees.—The inclosure of 30,000 acres in a pasture composed of about twelve miles of fencing and about fifteen to twenty miles of natural barriers, accompanied with the pasturing of a large herd of cattle, all bearing the same brand, duly recorded, to the exclusion of all other cattle and all other persons from such pasture; the use for which the land is most appropriate being the grazing of cattle; the same being almost daily attended by a representative of the owner, and the owner having his fence along the line of the particular land in question, and having some visible improvements upon such land, altogether constitute such adverse possession as contemplated by the statutes of limitation. Richards v. Smith, 67 Texas, 612; McDow v. Rabb, 56 Texas, 161; Portis v. Hill, 3 Texas, 279; Whitehead v. Foley, 28 Texas, 285; Cantagrel v. Von Lupin, 58 Texas, 577; Taliaferro v. Butler, 77 Texas, 582; 16 Am. and Eng. Ency. of Law, 146.

Where one commences his possession of land under a given claim of title thereto, continuing to claim in his own right, his claim as an element necessary to give title by limitation is not impaired by the fact that he thereafter buys in other claims, also adverse to plaintiff. Portis v. Hill, 14 Texas, 75; Converse v. Ringer, 6 Texas Civ. App., 57.

REESE, ASSOCIATE JUSTICE.—This is a suit in trespass to try title by Mrs. M. E. Loring, guardian of Susie B. Loring, against Mrs. Sarah Jackson and others, to recover the Maria T. Boden league of land in Chambers County.

Defendant pleaded general demurrer, general denial and "not guilty" and limitation of three, five and ten years, to which plaintiff replied setting up the disability of minority of Susie B. Loring. Defendants also pleaded that the deed from Juan Baptiste and Pierre Boden, heirs at law of the original grantee, under which plaintiff claims, is a forgery.

The cause was tried by the court without a jury and judgment rendered for defendants, from which plaintiff appeals.

Conclusions of law and fact were filed by the trial court.

The application of appellant for a continuance was not based upon

statutory grounds, but was addressed to the sound discretion of the court. After the admissions made by appellees we can not say that the refusal of the application was an abuse of the discretion of the trial court. One of the alleged purposes of the continuance was to enable appellant to procure testimony to meet the aspersions upon the reputation of her witness, W. R. Leonard, with regard to his connection with land forgeries as testified to by appellees' witness, S. T. Robb. To meet this ground appellees agreed that this part of the testimony of Robb, who testified by deposition, might be disregarded by the court. This put the testimony out of the case, and left Leonard unimpeached. There was no longer any necessity for evidence to show his innocence of the charge made against him by Robb. The rule that requires an admission that independent testimony for which a continuance is sought is true, does not apply. There being no charge left in the evidence impeaching the integrity of Leonard, testimony as to his integrity would have been unnecessary. His reputation was not in issue. (Rankin v. Busby, 25 S. W. Rep., 679.)

As to the testimony of other witnesses, to meet the issue as to the date of the death of Juan Baptiste Boden, one of the grantors in the deed executed in 1857, the agreement of appellees that it "might be assumed" that he died in 1858 was sufficient as an admission that he was alive at the date of the alleged forged deed. This was also a sufficient answer to the application insofar as concerns the desired testimony of Chamberlain and Fosky by whom appellant alleges she could prove the date of the death of Juan Baptiste Boden.

In view, however, of the disposition which is made of the case upon the defense of limitation, with which the matters set up in the application for continuance had no relation, error in overruling the application, if any, was harmless.

The court did not err in refusing to suppress the deposition of I. S. Robb and to exclude the testimony contained therein as to the general reputation of G. W. H. Martin as being a forger of land titles. The motion to suppress the deposition was based upon the alleged failure of the witness to answer fully certain cross interrogatories. We think that the answers were sufficient for all practical purposes. (Houston & T. C. Ry. v. Shirley, 54 Texas, 142.)

Upon the proposition that evidence of the general reputation of Martin as a forger of land titles was irrelevant and inadmissible the authorities are not uniform. (5 Am. and Eng. Ency. of Law, 862-3.) Appellees in their brief cite the case of De La Vega v. Leuage (2 C. C. A., 256), as settling the question. The lengthy opinion in that case makes no reference to the point. The pleadings of appellee directly charged that the alleged deed from Pierre and Juan Baptiste Boden to Martin was a forgery which involved the charge that Martin had committed, or at least was privy to the forgery. We think that the evidence as to the general reputation which Martin bore in Trinity County where he lived, and about the date of the alleged forged deed, as that of a forger of land titles was admissible.

There is no merit in the third assignment of error which attacks the ruling of the court in admitting certain testimony of the witness Hugh Jackson, in view of the explanation given by the trial court in allowing

the bill of exceptions. It was not improper for the court in a trial without a jury to hear the testimony in order to determine its admissibility. Having done this the court, as stated in the bill of exceptions, would have declared it inadmissible, but appellant insisted that it should go in the record with his bill of exceptions. The trial judge states that regarding the evidence as inadmissible it was not considered by him in making up his judgment.

The evidence was not admissible, but we can not agree with counsel that the trial judge could not completely divest himself of any impression which it might have produced upon his mind, when he came to consider the evidence for the purpose of rendering judgment. Even juries are supposed to be capable of doing so when evidence improperly admitted is afterwards withdrawn from their consideration. A trained judge acquires the habit of doing so completely.

One of the alleged marks of suspicion about the certified copy of the deed from the Bodens to Martin was that the impression of the seal of the county clerk of Liberty County, where the original purported to have been recorded, to his certificate, was different from that of the seal in use by said clerk and his predecessor for several years immediately before and after the date of such certificate to the copy of this deed. To prove this H. H. Jackson was sworn for appellees and produced certain instruments proven to be genuine, which bore the impress of the seal of the county clerk of Liberty County, one dated 1851, one 1856 and one 1861. The witness was further allowed to testify that he had examined a number of like old certificates of said clerk and that they all bear the impress of the same seal, except the certificate to the alleged certified copy of deed introduced in evidence by appellant, and that this impression is about one-sixteenth of an inch smaller than the others. In connection with this testimony comparison was made by the trial judge and a witness, sworn for that purpose, who made the comparison of the copy in question with those produced by the witness Jackson, with an instrument called a protractor, with a like result. Appellees were seeking to prove that in fact Pierre and Juan Baptiste Boden did not execute a deed to Martin of which the certified copy introduced in evidence purported to be a copy. The alleged original bore date September 13, 1857, and appellant introduced in proof of the original what purported to be a certified copy made by the county clerk of Liberty County June 5, 1858. The evidence of the forgery was entirely circumstantial, appellees' theory being that the certified copy was a forgery as well as the original deed, if such ever existed. We are inclined to think that the evidence was admissible as a circumstance to prove the forgery. These documents have been sent up with the record and we have carefully compared the different impressions of the seal upon the documents produced by the witness Jackson with that upon the copy of the deed in question, and we must say that we are not impressed with the force or value of the evidence thus furnished.

The findings of fact and conclusions of law thereon with regard to the possession by appellees and their ancestor of the Boden league, appear to be full and specific and there was no error in refusing further findings upon motion of appellant which could have been only useless repetition of the findings made.

The testimony with regard to the conveyance by Marie Teresa Boden to Pinckney Caldwell in 1835 of the land in controversy appears to us to be immaterial in any view to be taken of it. It could not properly have affected the result of the trial. If the deed from Pierre and Juan Baptiste Boden to Martin, which is an essential link in appellant's chain of title, be a forgery, this of itself is an effectual bar to her recovery. If this deed be genuine she would be entitled to be protected in her title on the ground that she and those under whom she claims are innocent purchasers without notice of this deed from Mrs. Boden. (Eastham v. Hunter, 86 S. W. Rep., 323.) For the reason that the deed to Martin was found by the trial court to be a forgery the court finds further that appellant holding under such forged deed, could not be an innocent purchaser.

The findings of the court that plaintiff made no sufficient proof of innocent purchaser in good faith for value, which is assigned as error in appellant's seventh assignment, must have been based upon the finding that the deed from the Bodens to Martin was a forgery. If this deed was a genuine instrument we think the evidence shows that those claiming under it were such purchasers. This is conclusively shown by the testimony of W. R. Leonard, who seems to have been discredited by the court principally, if not altogether, by the evidence from which the court found the deed to be a forgery. Leonard testified that he saw the grantors execute this deed and receive the price of the land. If the other evidence led to the conclusion that this deed was a forgery, naturally it would so far discredit Leonard that the court was justified in disregarding his testimony entirely.

The findings of the trial court that this alleged deed from Pierre and Juan Baptiste Boden to Martin was a forgery is assailed by appellant in her ninth assignment of error as against the weight of the evidence. This deed was attempted to be proven by a certified copy from the records of deeds of Liberty County, purporting to have been made on the 5th of June, 1858, of a deed purporting to have been recorded January 24, 1858, and by the testimony of W. R. Leonard that he saw the parties execute the deed. Its genuineness was assailed by evidence of various circumstances which the court found to be sufficient to show that it was a forgery. Many of these circumstances were very slight and standing alone would not be held sufficient to cast suspicion upon the deed. Some of them are set out by the trial court in its finding upon this point, as the evidence of the witness Manchaca, who testified upon the stand, that he knew Pierre and Juan Baptiste Boden and that Pierre Boden was killed in 1839 (the deed purports to have been executed in 1857), the notorious reputation of Martin as a forger of land titles, as shown by the testimony of S. T. Robb, and indications of fraud upon the papers themselves. Other circumstances referred to are not specifically set out in the court's findings. The action of Martin in taking out a certified copy a few months after the original was recorded was an unusual circumstance.

It is claimed by appellee that the certified copy of the deed to Martin is a forgery, that is, that the original was not in fact entered upon the records of Liberty County. The only evidence of this, so far as is disclosed by the record, is the difference in the size of the impression of the

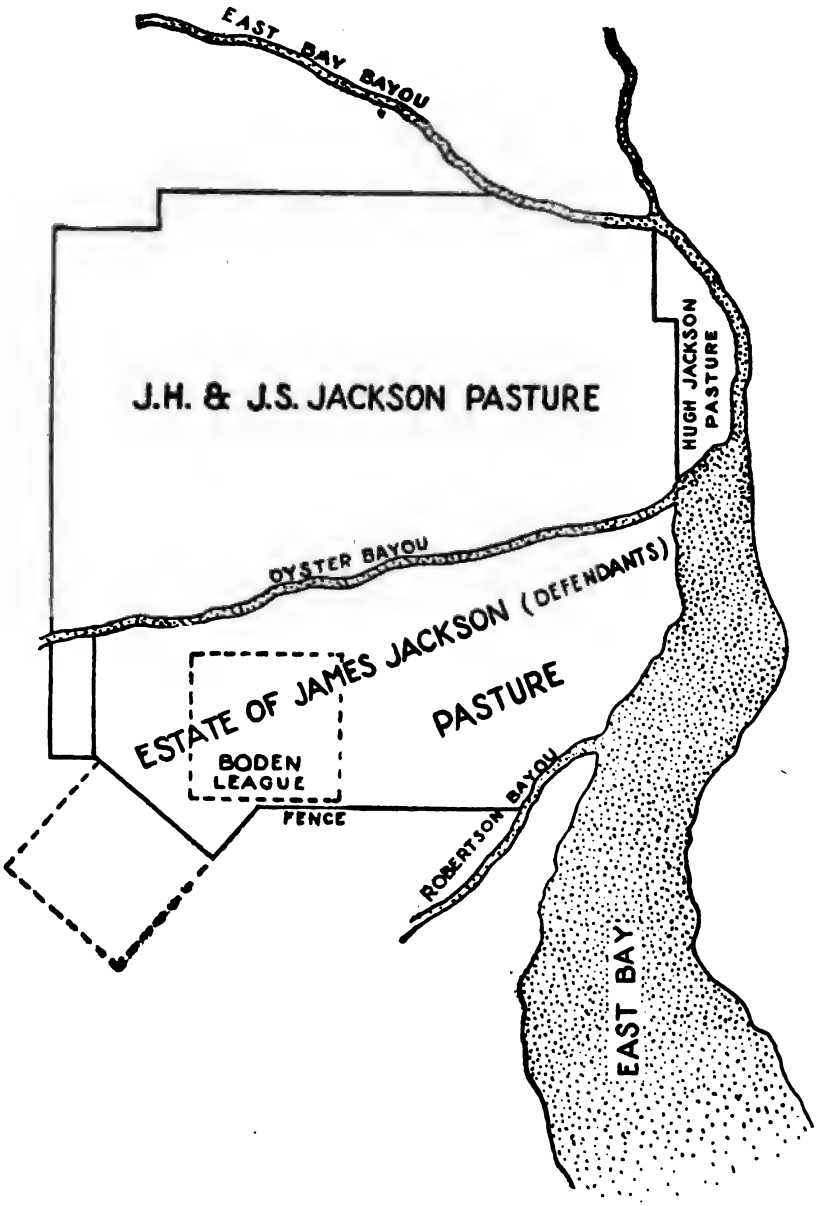
seal on this, and that on other instruments proven to be genuine, of about one-sixteenth of an inch. If the finding of the court rested upon the assumption that the certified copy was a forgery we would hold that it is not supported by the evidence, but taking all of the evidence in the record tending to cast suspicion upon the deed in question, we are not prepared to say that the finding of the trial court that it is a forgery is so against the weight and preponderance of the evidence as to justify this court in sustaining the assignment of error presenting that question.

Other assignments of error assail the findings of fact and the judgment of the court thereon, that appellant's claim is barred by the statute of limitations of five and ten years. Descent was cast upon the children of Lucius Loring by his death in 1886 at which time they were under disability of minority. To bar appellant's claim the statute must have been set in operation before the death of Lucius Loring. Upon this point the court found as follows:

"James Jackson, deceased, husband of the defendant, Mrs. Sarah Jackson, and father of the other defendants, enclosed the land in controversy as early as 1880. James Jackson died in 1895. He and his surviving wife and descendants have continually kept the said land enclosed since 1880. This enclosure consists in part of fencing extending on and along the west line of the land in controversy, constructed by said Jackson and continuously maintained and kept up by him and his surviving wife and descendants to the present time, and in part of impassable water lines. They have made use of the land for pasturing their herd of cattle which consists of from three to five thousand head. Since they first took possession of the land defendants and their ancestors have paid all taxes on the land in controversy regularly and promptly every year since and including 1880 up to the present time. On June 5, 1884, Henry Sayles executed a conveyance to said James Jackson, deceased, of the entire league of land in controversy; this was placed duly of record in Chambers County on the 20th day of June, 1884. From the spring of 1885 up to and including the year 1890 the defendant's ancestor kept up the house on the premises, which was used to camp in and hunt from and in connection with the rounding up and care of cattle, this last circumstance not being regarded as important. I find that the enclosure maintained by the defendants and their ancestors has always been as complete and effective as if an ordinary fence had been extended all the way around the pasture. The said pasture contains about 26,000 acres and all the land in same being owned by defendants at the present time except about 180 acres which are held under lease; that all of the land was either owned or claimed exclusively by the defendants and their ancestors at the time of their taking possession in 1880, or so held under authority from persons whose title was recognized by the defendants and their ancestors, and during all the period they were claiming the land in controversy as their own."

These findings are supported by the evidence and are here adopted.

The following sketch, copied from appellant's brief, will explain the conditions with regard to the enclosure.



The Boden league was enclosed, with other lands belonging to or controlled by Jackson, in a large pasture. On the north and east the enclosure consisted alone of the impassible water barriers of Oyster Bayou and East Bay. Robertson's Bayou formed a small part of such enclosure on the southeast. The enclosure on the south and west was a

substantial wire fence with gates for entrance. There were about twelve miles of fence and about fifteen or twenty miles of water barrier. The fence was erected by Jackson, appellees' ancestor, for the sole purpose of enclosing the pasture in question, including the land in controversy, and, as found by the court, all of the land within the enclosure was owned or claimed exclusively by appellees or their ancestor or held under authority of the owners whose titles were recognized by them. The facts are entirely different from those in Polk v. Beaumont Pasture Co. (64 S. W. Rep., 61), and Vineyard v. Brundrett (42 S. W. Rep., 232).

It is true that appellant entering this enclosed pasture from the water side would have encountered no obstruction of any kind in getting to the land claimed by her, but this would be the case with every enclosure fenced to any considerable extent by a water barrier. Such enclosure, however, would be sufficient as a basis for the statute of limitation "if the natural barriers are so used in connection with the artificial barriers as to indicate that they are relied upon to inclose the land and keep out other persons desiring access thereto." (Polk v. Beaumont Pasture Co., *supra.*) The fence forming part of the enclosure in the present case ran along one of the lines of the league in controversy for nearly the entire length of one of the sides of the league. The fence was erected by Jackson and maintained by him and appellees, his successors in the title, for the purpose of enclosing and thus taking exclusive possession, adverse to appellant, of the land in controversy, together with other lands in the enclosure claimed by appellees, and the possession thus taken and maintained was amply sufficient to give notice to appellant of such adverse holding. In addition, a fact of no value of itself, but of some force in connection with the circumstances of the enclosure, appellees kept about 5,000 head of cattle in their own brand in the pasture, no other cattle being allowed therein, and kept for a great portion if not all of the time a small house on the land used occasionally by persons caring for the cattle.

We think the facts constitute such notorious adverse possession, use and occupation of the land as to bar appellant's claim under the statute of limitations. The findings of the court show that such possession was for a sufficient length of time, under the other facts found, to authorize the conclusion of law that appellees had title under both the five years and the ten years statute of limitations. This was not affected by the proceedings in the Federal Court against James Jackson and others. There was nothing in the proceedings and judgment in this case inconsistent with James Jackson's claim under the Sayles deed, or that could be construed as an abandonment of his claim under that deed. If the finding of the trial court on this issue be correct, none of the errors assigned, if errors in fact, would be material, as they have no bearing upon this issue.

We find no errors requiring a reversal of the judgment, and it is affirmed.

Affirmed.

Writ of error refused.

J. G. WILLIAMS v. G. K. CESSNA ET AL.

Decided May 29, 1906.

1.—Deed—Registration—Certificate.

Following the record of a deed and the certificate of acknowledgment on a deed record book was the following certificate: "I hereby certify that the above and foregoing is a true and correct copy of the original deed from Sarah Davis, administratrix, and Isaac H. Roberts, administrator of the estate of W. P. Davis, deceased, to G. W. Grant, that the same was presented for registration on the 15th day of September, A. D. 1848, at 10 o'clock a. m., and duly registered this day at 9 o'clock a. m." Held, to mean that the original deed, and not a copy of the same, was copied by the officer into the record book.

2.—Affidavit of Loss—Sufficient.

An affidavit of loss of a deed correctly described the lost deed by giving the names of the two grantors, the name of the grantee, the date, the number of acres conveyed and the location of the land, except that the initials of one of the grantors were stated to be J. H. instead of I. H. Held, an immaterial variance.

3.—Proof of Deed for Registration—Statute of 1846 Construed—Cases Reviewed.

Under the statute of 1846 it was not necessary that a subscribing witness to a deed, in proving the same for registration, should make oath that he signed the same as a witness at the request of the grantor. The cases of Dorn v. Best, 15 Texas, 62; Downs v. Porter, 54 Texas, 64; Jones v. Robbins, 74 Texas, 615; Cox v. Rust, 29 S. W. Rep., 808; Deen v. Wills, 21 Texas, 642, and Sowers v. Peterson, 59 Texas, 220, reviewed.

4.—Administrator's Deed—Proof of Authority—Ancient Instrument—Recitals.

An administrator's deed, more than thirty years old, contained a recital that the sale of the land thereby conveyed was made by order of the Probate Court having jurisdiction of the estate; the deed and probate records of the county were subsequently destroyed by fire; it was shown by the undisputed testimony of a son of the decedents that the grantors in said deed administered the estate under the Probate Court of said county; that the grantee in said deed purchased the land in controversy, through said administration proceedings and continuously and notoriously claimed it thereafter. Held, sufficient to show the authority of the administrator to sell the land. Under the statute in force in 1845 no confirmation of the sale was required. The records being destroyed, the recitals in the ancient deed were sufficient in themselves to show that the sale was made under the orders of the Probate Court.

5.—Certificate of Acknowledgment—Officer.

The caption of a certificate of acknowledgment was, "State of Texas, Walker County;" following the name of the officer were the words and letters, "Notary Public, W. C. S. T." Held, the caption and the letters when taken together sufficiently indicate that the officer taking the acknowledgment was a notary public of Walker County, State of Texas.

Error from the District Court of Houston County. Tried below before Hon. John Young Gooch.

Aldrich & Crook, for plaintiff in error.—The proper recording of a deed before filing and notice is indispensable to its admissibility without proof of execution, and the certificate of proof by a subscribing witness is insufficient unless it states that the witness swears that he was present and saw the grantors sign the same, or that he signed the same at the request of the grantors. Rev. Stats., arts. 4622-4624; Dorn v. Best, 15 Texas, 62; Cox v. Rust, 29 S. W. Rep., 808; Jones v. Robbins, 74 Texas, 615.

Only deeds that have been duly registered are admissible in evidence without proof of execution, and where the certificate of acknowledgment does not show the character of the officer taking the acknowledgment the acknowledgment is defective and the deed is not duly registered. Rev. Stats., arts. 4616-4619; Gulf, C. & S. F. Ry. Co. v. Carter, 5 Texas Civ. App., 675; Coffey v. Hendricks, 66 Texas, 676.

Nunn & Nunn, for defendant in error.—All that can be required is that the certificate of the officer shall contain the substance of the proof; and if it contains all that is essential to prove the execution of the deed, it must be deemed a substantial compliance with the requirement of the statute, and it is not essential to the proof of the due execution of the instrument, that the witness should depose to the fact of his having signed at the request of the grantor. The presumption is that the subscribing witness did so sign, and the statement would add nothing to the legal effect of the certificate of proof. Deen v. Wills, 21 Texas, 642; Sowers v. Peterson, 59 Texas, 216; Monroe v. Arledge, 23 Texas, 479; Laws of Texas (Gammel, vol. 4, pp. 1437 and 1438).

If it appears with reasonable certainty from the certificate of the officer taking the acknowledgment, or before whom proof is made, endorsed on the deed, the official character of the officer, by appropriate words used, or by letters attached to his name, abbreviating such words, such certificate is sufficient, and the deed entitled to registration. McDonald v. Morgan, 27 Texas, 505; Blythe v. Houston, 46 Texas, 79; Alexander v. Houghton, 86 Texas, 705.

In suit to recover land, after long lapse of time, after the destruction of probate records and papers pertaining to the administration of the estate, and after the death of the administrator, claimed to have been regularly sold under order of court by the administrator, the production of the deed from the administrator made as long as twenty-five years before, containing recitals which, if true, showed the regularity of the sale, it will be presumed that the court and its officers did their duty, and the sale will be upheld. White v. Jones, 67 Texas, 638; Bartley v. Harris, 70 Texas, 183.

After the death of the husband, the wife may convey community property in payment of community debts, and after great lapse of time, presumption that community property was sold in payment of community debts may be indulged. Hilburn v. Harris, 2 Texas Civ. App., 398; Moore v. Wagner, 2 U. C., 531.

If community property be sold by the survivor to pay community debts, the purchaser will be protected. Jones v. Jones, 15 Texas, 146; Burleson v. Burleson, 28 Texas, 418; Wenar v. Stenzel, 48 Texas, 488; Wilson v. Helms, 59 Texas, 682.

PLEASANTS, ASSOCIATE JUSTICE.—This is an action of trespass to try title to a tract of 307 4-10 acres of land on the Wm. P. Davis league in Houston County brought by defendant in error G. K. Cessna, against D. J. Jones. Plaintiff in error, who had sold the land to Jones, was vouched in on his warranty.

The trial court instructed the jury to find a verdict for plaintiff against Jones and in favor of Jones against plaintiff in error for the amount

paid by him for the land with interest. The verdict was returned as directed and judgment was rendered in accordance therewith.

The first assignment of error is as follows: "The court erred in admitting in evidence, over the objection of defendants, the instrument purporting to be a certified copy of a deed from Sarah Davis, administratrix, and I. H. Roberts, administrator of the estate of William P. Davis, deceased, to George W. Grant, because said instrument shows upon its face that it is a certified copy of a certified copy and not a certified copy of the original instrument, and hence not admissible under the statute as a recorded instrument; and, second, because no sufficient predicate was laid for its admission as secondary evidence, no sufficient affidavit of the loss of the original instrument having been filed; and, third, because same purports to be the deed of administrators of the estate of William P. Davis, deceased, and no authority of the County Court of Houston County in which the administration was pending is shown for making such sale or making such deed, no order of sale or order of confirmation of sale being shown; and fourth, because the certificate of authentication to said instrument was insufficient in that the subscribing witness by whom it is attempted to prove said deed for record does not swear that he saw the grantors sign the same, or that they signed the same in his presence, or that he signed the same as a witness at the request of grantors."

The third assignment complains of the action of the court in not submitting to the jury the issue of whether the administrators of the estate of Wm. P. Davis had authority to make the sale and conveyance to Grant.

The trial judge did not err in overruling the objections to the introduction of this deed in evidence. The record shows that the deed and probate records of Houston County were all destroyed by fire in 1865 and again in 1882. The certified copy introduced in evidence was made in 1861 by O. C. Aldrich, the then county clerk of Houston County. Preceding Aldrich's certificate and immediately following the certificate of acknowledgment is the following certificate:

"I hereby certify that the above and foregoing is a true and correct copy of the original deed from Sarah Davis, administratrix, and Isaac H. Roberts, administrator of the estate of W. P. Davis, deceased, to G. W. Grant, that the same was presented for registration on the 15th day of September, A. D. 1848, at 10 o'clock a. m. and duly registered this day at 9 o'clock a. m.

"In testimony whereof I hereunto subscribe my signature officially at Crockett this 21st day of September, 1848.

J. H. Gillespie, Clk. Co. Ct. H. Co.
By James M. Hall, Deputy."

The acknowledgment was taken by Gillespie on September 15, 1848. We think it clear that the certificate made by Gillespie, as above set out, should not be construed to mean that the instrument recorded in the deed records of Houston County was a copy of the original deed, but that the record made by the officer upon the pages of the record book was a true copy of the original deed, or in other words, that the original deed was truly copied in the record. The officer was not required

to enter a certificate of this kind upon his record, but such entry could not in any way affect the validity of the record. There was no authority for the record of a copy of a deed, and if the language of the certificate could be construed to mean that such copy had been recorded that is certainly not its necessary construction, and the language being ambiguous that interpretation should be given it which would make the act of the officer lawful.

The affidavit of the loss of the original deed described it as the deed of "Sarah Davis, Administratrix, and J. H. Roberts, Administrator of the estate of Wm. P. Davis, deceased" to G. W. Grant. The date of the deed and the number of acres and location of the land conveyed is also stated. The copy of the deed introduced in evidence was in all respects identical with the deed described in the affidavit except that the initials of the administrator Roberts are "I. H." instead of "J. H." This, we think, was an immaterial variance clearly due to a clerical mistake, and plaintiff in error could not have been misled as to what deed defendant in error claimed he could not procure and intended to supply by certified copy.

The certificate of the officer before whom the deed was proven for record is in the following language:

"The State of Texas,}
Houston County.}

"This day personally appeared before me the undersigned authority, James S. Cartwright, to me well known, and acknowledged that he signed the above and foregoing deed as a witness at the request of the grantors and being duly sworn upon oath says that Sarah Davis and I. H. Roberts whose signatures and seals appear to the same as administratrix and administrator of the estate of Wm. P. Davis, deceased, acknowledged in his presence that they each signed, sealed and executed the said deed for the purposes and considerations therein stated."

The objection urged by plaintiff in error to this certificate is that it does not appear therefrom that the subscribing witness made oath that he signed the deed as a witness at the request of the grantors.

The statute of 1846, which was in force at the time the deed was proven for record, provides "that proof of any instrument of writing for the purpose of being recorded, shall be by one or more of the subscribing witnesses personally appearing before some officer authorized to take such proof, and stating on oath that he or they saw the grantor, or person executing the instrument, sign the same, or that the grantor or the person who executed such instrument of writing acknowledged in his or their presence that he had subscribed and executed the same for the purposes and consideration therein stated, and that he or they had signed the same as witnesses at the request of the grantor or person who executed such instrument."

If this statute be literally construed it would seem to require that the witness by whom the execution of an instrument is proven must swear that he signed the instrument as a subscribing witness at the request of the grantor. In the case of Dorn v. Best, 15 Texas, 62, it was held that when the witness swore that he saw the grantor execute the instrument he was not required to further swear that he signed it as a

witness at the request of the grantor, proof of such request being only necessary when the instrument was not executed in the presence of the witness, but acknowledged before him by the grantor. We can see no room for this distinction. The law requires that before a deed or other written instrument required or permitted to be recorded shall be admitted to record its execution must be proven by the acknowledgment of the grantor made before an officer authorized to take same, or by the sworn statement of a subscribing witness that he saw the grantor execute the instrument or that the grantor acknowledged to him that he executed it for the purposes and consideration therein expressed. It is just as necessary that the subscribing witness who sees the deed executed should be requested by the grantor to subscribe to it as that such request should be made of the witness before whom the grantor acknowledges its execution, and in neither case can the proof be made by a volunteer.

If we can indulge the presumption that the subscribing witness who swears that he saw the grantor execute the deed signed the deed as such witness at the request of the grantor, we should indulge the same presumption as to the subscribing witness who swears that the grantor acknowledged before him that he executed the deed. In the case cited the court was not called upon to pass on the question of whether a certificate which fails to show that a subscribing witness who swore that the grantor in such instrument acknowledges its execution also swore that he signed the instrument as a witness at the grantor's request was sufficient proof of the execution of such instrument and therefore the opinion expressed upon that question was *obiter*.

In the case of Deen v. Wills, 21 Texas, 642, it was held that as the statute did not prescribe the form of the certificate it was not essential to the validity of the registration of a deed proven for record by a subscribing witness, that the certificate should state that the witness signed as such at the request of the grantor. In that case the court say: "All that can be required is that the certificate shall contain the substance of the proof; and if it contains all that is essential to prove the due execution of the deed it must be deemed a substantial compliance with the statute. It is not necessary to the proof of the due execution of the instrument that the witness should depose to the fact of his having signed at the request of the grantor. The presumption is that the subscribing witness did so sign and the statement would add nothing to the legal effect of the certificate or proof." The case does not refer to the case of Dorn v. Best, but seems to be in direct conflict with the portion of the opinion in that case holding that when the proof is made by a subscribing witness who did not see the deed executed the certificate must show that such witness swore that he subscribed the deed at the request of the grantor.

The cases of Downs v. Porter, 54 Texas, 64, and Jones v. Robbins, 74 Texas, 615, both hold, under authority of Dorn v. Best, that when the proof is made by a witness who saw the deed executed that it is not essential that the certificate should show that the witness subscribed the deed at the grantor's request.

In Cox v. Rust, 29 S. W. Rep., 808, the Court of Civil Appeals for the Fourth District decided that when the deed was proven by a subscrib-

ing witness who was not present at its execution, the certificate must state that the witness swore that he subscribed the deed at the request of the grantor. In support of this decision the court cites the cases of Dorn v. Best, Downs v. Porter, and Jones v. Robbins, *supra,* and Sowers v. Peterson, 59 Texas, 220.

As we have before stated, in none of the three cases first cited was the point up for decision, the question before the court in those cases being as to the validity of a certificate which stated that the subscribing witness swore that he saw the grantor execute the deed, but failed to state that such witness swore that he subscribed the deed at the request of the grantor.

While both the Downs and Jones cases apparently approve the distinction made in the Dorn case, they are not binding authority because the question was not before the court for decision. The case of Sowers v. Peterson, 59 Texas, 220, follows Deen v. Wills and holds that it is not essential that the certificate should state that the witness who swore that the grantor acknowledged the execution of the deed before him, also swore that he subscribed at the request of the grantor.

From this review of the decisions it appears that there is no authority for holding that the certificate in this case is insufficient under the statute of 1846, which was in force at the time it was made. If it was an open question the writer would construe the statute as requiring the witness to swear as an essential part of the proof of the due execution of the deed, that he was requested by the grantor to witness its execution, or if it was acknowledged before him by the grantor, that he was requested to sign the deed as a witness at the time it was so acknowledged. If this is an essential part of the proof it must in substance at least be contained in the certificate. We think it clear that under the present statute, article 4624 of the Revised Statutes, the certificate must show that the witness signed at the request of the grantor. The date of the certificate under consideration in the case of Cox v. Rust is not shown in the opinion and it was probably subsequent to the enactment of the present statute. Upon the authority of the cases of Deen v. Wills and Sowers v. Peterson, before cited, we hold that the trial court properly overruled the objection to the certificate.

The deed contains the following recitals: "The Hon. Probate Court for the county of Houston, State aforesaid, at the February term thereof, 1845, did order and decree that the administrators of the estate of Wm. P. Davis, deceased, sell so much of the lands of said estate as would be of value sufficient to liquidate the debts against said estate, and whereas John Blair and G. W. Wilson, duly appointed and sworn to appraise said lands, did appraise lots numbers 5, 6 and 7 to be of the value of —— per acre, amounting to —— dollars, and Whereas, I. H. Roberts, administrator of said estate, after due and legal notice, did, on the 1st day of July, 1845, offer said lots 5, 6 and 7 to the highest bidder at public sale, before the court house door of said county, and whereas George W. Grant at said offering for sale, did bid for said tracts or lots of land the sum of one hundred and thirty-one and 11-100 dollars, it being off the said lands to the said Grant, . . . therefore we, etc."

It was also shown that all of the deeds and probate records of Houston County made prior to 1859 were destroyed by fire in 1865. W. W. Davis,

who is a son of W. P. and Sarah Davis, testified that his father died between the years 1840 and 1845, and that his mother and his brother-in-law, Isaac H. Roberts, administered his father's estate through the Probate Court of Houston County and that said administration was closed before his mother's death, which occurred in 1849; that George W. Grant purchased a portion of the Wm. P. Davis league through said administration proceedings and afterwards claimed it and it was known in the community as the Grant land; that all of the league was sold during said administration except one tract; that the league of land was community property of his father and mother and the sales made by the administrators were made for the purpose of paying community debts. This evidence is undisputed, and is, we think, not only sufficient to show the authority of the administrators of the estate to sell the land, but is conclusive upon that issue, and the trial court did not err in so instructing the jury. The sale of the land was made in 1845, as shown by the recitals in the deed, and under the statute then in force no confirmation of the sale by the Probate Court was required. (Harris v. Brower, 3 Texas Civ. App., 653.) The records of the county having been shown to have been destroyed by fire the recitals in the deed, which was an ancient instrument, were sufficient in themselves to show that the sale was made under the orders of the Probate Court. (White v. Jones, 67 Texas, 638.)

There is no merit in the second assignment of error which complains of the ruling of the court in not sustaining defendant's objection to the introduction in evidence of a certified copy of a deed from George W. Grant to Jacob Allbright conveying the land in controversy, the ground of the objection being that the certificate of acknowledgment does not purport to have been made by an officer authorized by law to take acknowledgments. This certificate is as follows:

"The State of Texas,}
Walker County.}

"Personally came George W. Grant before the undersigned authority, to me personally known, and acknowledged the execution of the foregoing deed of conveyance to be his act and deed for the purpose and consideration therein named.

"To certify which I have hereunto signed my name and affixed my notarial seal this the 10th day of April, A. D. 1856.

M. C. Rogers, Notary Public W. C. S. T."

We think the official character of the officer taking the acknowledgment is shown by the certificate. The letters W. C. S. T. after the words notary public, considered in connection with the caption which shows that the acknowledgment was taken and the certificate made in Walker County, Texas, sufficiently indicates that the officer was a notary public of said county and State.

We find no error in the record and the judgment of the court below is affirmed.

Affirmed.

Writ of error refused.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY ET AL. v. KYSER & SUTHERLAND.

Decided May 30, 1906.

1.—Charge—Assuming Facts.

A mere statement in the charge of the issues made by the pleadings can not be construed as assuming the existence of proof on those issues.

2.—Measure of Damages—Difference in Market Price—Charge.

An instruction, in a suit for damage by delay of a shipment of cattle, that the measure of plaintiff's damage was the difference in the market price, if transported in the usual and ordinary time, and that realized on transportation in the time actually made, was not ground for reversal where the defendant asked and obtained an instruction relieving it from such liability if it used ordinary care and diligence in the transportation.

3.—Evidence—Personal Knowledge—Presumption.

A witness who testifies to the weights of cattle when sold at the stock yards is presumed, in the absence of evidence to the contrary, to speak from his personal knowledge.

4.—Contributory Negligence—Feeding Cattle.

Contributory negligence will not be attributed to a shipper of cattle in not keeping charge of and feeding his cattle before loading, where he placed them in the loading pens at the instance of the railway agent and on his assurance that the cars for loading them were expected soon, but such cars were delayed, and the cattle suffered damage while awaiting them.

Appeal from the District Court of Falls County. Tried below before Hon. Sam R. Scott.

T. S. Miller and *Martin & Martin,* for appellants.—The statement of the case assumed that the plaintiffs' cattle were, as a matter of fact, injured as alleged in plaintiffs' petition. International & G. N. Ry. Co. v. Locke, 67 S. W. Rep., 1084; Missouri, K. & T. Ry. Co. v. Rodgers, 40 S. W. Rep., 852.

A carrier is usually only required to use ordinary care and diligence, under all the circumstances, in transporting cattle to market. Greismer v. Lake S. & M. S. Ry. Co., 26 Am. and Eng. R. R. Cases, 287.

Overstreet did not weigh plaintiffs' cattle nor see them weighed; his testimony as to the weights of same was hearsay. Texas & P. Ry. Co. v. Scott, 86 S. W. Rep., 1065; Texas & P. Ry. Co. v. Leggett, 86 S. W. Rep., 1066.

The contributory negligence on the part of a plaintiff is a complete defense to his action, and especially is this the case when, as in this case, the damages caused by the contributory negligence can not definitely and certainly be ascertained and separated from the damage, if any, caused by the defendant. Fort Worth & D. C. Ry. Co. v. Daggett, 87 Texas, 329; Texas & P. Ry. Co. v. Byers, 73 S. W. Rep., 427; Texas & P. Ry. Co. v. Peters, 71 S. W. Rep., 70; Texas & P. Ry. Co. v. Arnold, 16 Texas Civ. App., 76.

W. E. Hunnicutt and *Z. I. Harlan,* for appellees.—The charge complained of is merely introductory to the main charge, a mere calling

of the attention of the jury to the issues before them. Atchison, T. & S. F. Ry. Co. v. Cuniffe, 57 S. W. Rep., 692; International & G. N. Ry. Co. v. Tabor, 12 Texas Civ. App., 289; Missouri Pac. Ry. Co. v. Lehmberg, 75 Texas, 66.

The minimum legal duty which the defendants as common carriers owed to plaintiffs as shippers was to haul their cattle in the usual and ordinary course of business, taking into consideration its own track conditions which might render speed slow. San Antonio & A. P. Ry. v. Pratt, 89 Texas, 310; Gulf, C. & S. F. Ry. v. Ellison, 70 Texas, 492; Missouri Pac. Ry. v. Nicholson, 2 App. C. C., sec. 168; Gulf, C. S. F. Ry. v. Beattie, 13 Texas Ct. Rep., 598; St. Louis S. W. Ry. v. Hunt, 81 S. W. Rep., 322.

Where a railroad company contracts to furnish cars to ship cattle in on a specific day, it is liable for the damages resulting from the failure to do so, and can not avoid the liability by showing that a bridge was burned out on its road after the time for furnishing cars, and after the time the cattle would have passed the place had the cars been furnished and the cattle shipped according to contract. Gulf, C. & S. F. Ry. v. McCorquodale, 71 Texas, 41; Texas & P. Ry. v. Davis, 93 Texas, 389; Cross v. McFadden, 20 Texas Civ. App., 464; Texas & P. Ry. v. Nicholson, 61 Texas, 495.

For whatever damages were sustained awaiting the arrival of the cars, defendants are liable, regardless of the provisions of the shipping contract which was not executed until after the cars arrived. Texas & P. Ry. v. Nicholson, 61 Texas, 495; Gulf, C. & S. F. Ry. v. House, 88 S. W. Rep., 1111; Missouri, K. & T. Ry. v. Carter, 9 Texas Civ. App., 690.

Overstreet having testified that he personally effected the sale of these cattle, that their correct weights were shown in the account sales rendered to plaintiffs, and as to what the true and real weights of the cattle were, the presumption arose that he was present and saw the cattle weighed and that he knew their weights. Texas & P. Ry. v. Daugherty, 76 S. W. Rep., 606; Hubbard City Oil Co. v. Nichols, 89 S. W. Rep., 797; Elliott on Evidence, 460.

EIDSON, Associate Justice.—This is an action brought in the court below by appellees against appellant for alleged damages to a shipment of cattle. That part of the charge of the court below complained of in appellant's second assignment of error is merely a statement of the issues made by the pleadings, and could not be regarded as assuming the proof of any issue in the case. (Atchison, T. & S. F. Ry. Co. v. Cuniffe, 57 S. W. Rep., 692; International & G. N. Ry. Co. v. Tabor, 12 Texas Civ. App., 289.)

Appellant's third assignment of error assails that part of the charge of the court below relating to the measure of damages, upon the ground that it instructs the jury that plaintiff would be entitled to recover the difference in the market price of the cattle in the market at National Stock Yards at the time they should have arrived at said market "in the usual and ordinary course of business in shipping such cattle to market," and the time when the cattle actually reached the National Stock Yards and were placed on the market; whereas the correct measure of damages is the difference in the market value of the cattle at the time when they

should have reached the market by the use of ordinary care and diligence in the transportation of said cattle from the place of shipment, and the time when said cattle did in fact arrive at said market. As contended by appellants, a carrier is usually only required to use ordinary care and diligence under all the circumstances in transporting cattle to market; but we do not think appellants were prejudiced by the instruction complained of, in view of the fact that they requested and the court gave a special instruction embracing the same proposition as to their liability; and, in effect, conceding their duty in this transaction to be to transport plaintiffs' cattle to their destination within the usual time necessary for that purpose, but which sought to avoid liability for failure to perform that duty on the ground of the wet and soft condition of appellant's track.

Appellant's fourth assignment of error is not well taken. The charge complained of in this assignment was proper, in view of the pleadings and evidence in the case.

There was no error in the refusal of the court below to strike out the testimony of the witness Overstreet on motion of appellants, upon the alleged ground that it was hearsay. While it does not affirmatively appear from the testimony that Overstreet was present and saw the cattle weighed, his testimony as to their weights implies personal knowledge thereof; and, in the absence of testimony to the contrary, the inference will be indulged that he saw the cattle weighed and testified from personal knowledge. (Texas & P. Ry. Co. v. Daugherty, 76 S. W., 606; Hubbard City Oil Co. v. Nichols, 89 S. W., 797.)

Appellants' eleventh assignment of error is overruled. We think there is ample testimony shown by the record to support the verdict of the jury. The testimony showed damages sustained by the cattle during the delay in furnishing the cars equal to the amount of the verdict, independent of any sustained during transportation.

Appellants by their twelfth assignment of error contend that appellees are precluded from recovering in this case by their contributory negligence, which consists in their failure to feed and water the cattle while they were in appellants' stock pens awaiting shipment and during their transportation, and especially for the reason, as they claim, that the damage caused by the contributory negligence of appellees can not definitely and certainly be ascertained and separated from the damage, if any, caused by appellants. We do not think the doctrine of contributory negligence applies to the facts of this case, as the evidence clearly shows that whatever injury or damage was caused to appellees' cattle by the failure of appellant to furnish the cars for their shipment according to the contract or to transport them with proper diligence, was separate from and not brought about or contributed to by any fault of negligence of appellees. It does not constitute contributory negligence on the part of the shipper to put his cattle in the pens of the carrier at its instance and direction, and allow them to await the arrival of cars without feed or water, when the agent of the carrier informs him that the cars are expected soon. (Gulf, C. & S. F. Ry. Co. v. House, 88 S. W. Rep., 1112.) Under the circumstances shown by the testimony, we think the jury were justified in holding that appellants were liable for all the damages sustained by the cattle during the time they were in the pens await-

ing the cars. And there is testimony showing that they were damaged during this time in an amount equal to the amount found by the verdict of the jury for depreciation in weights. However, the charge of the court protected appellants against any liability for damages accruing to the cattle on account of their not being fed or watered, and limited appellees' recovery on account of shrinkage in weight to that occasioned by the unnecessary delays in the shipment of the cattle.

As already stated, we think the testimony shown by the record sufficient to support the finding of the jury as to damages caused by depreciation in the weight of the cattle; and hence overrule appellants' ninth assignment of error.

No reversible error appearing in the record, the judgment of the court below is affirmed.

Affirmed.

Missouri, Kansas & Texas Railway Company of Texas v. Basil Parrott.

Decided May 30, 1906.

1.—Contributory Negligence—Charge.

Following the ruling of the Supreme Court herein on certificate of dissent (100 Texas, 9), holding the charge given on contributory negligence sufficiently full to justify refusing further requested instructions, to the same effect but more elaborate, the judgment is affirmed.

2.—Evidence—Negligence—Other Instances.

On the issue whether a person was negligent on the occasion in question, evidence that he committed similar acts of negligence on other occasions is inadmissible.

3.—Evidence—Negligence—Disregard of Rules.

On the issue of plaintiff's contributory negligence in leaving open a switch in violation of a rule of his employer, which rule it was claimed was ineffective because not enforced, evidence that switches were frequently found open by a witness running on the road nine months before the accident was admissible, the question whether the conditions and rules were the same going to its effect rather than its admissibility.

4.—Charge—Omission.

A mere omission to charge fully on an issue is not error without a requested charge supplying the omission.

5.—Violation of Rule—Question of Fact.

The question whether it was contributory negligence to leave open a switch in violation of a rule of the employer was one of fact under the circumstances, there being evidence tending to show that the rule was not enforced.

Appeal from the District Court of Bastrop County. Tried below before Hon. Ed. R. Sinks.

The fifth paragraph of the charge, referred to in the opinion, was as follows:

If you believe that rule 104a was in force at the time of the plaintiff's injury, and intended by the company to be observed by the plaintiff, and that by his failure to have the switch closed in obedience to the

requirement of said rule, he was guilty of negligence, to find for the defendant.

Page, Miley & Price, for appellants.—Where the defense was contributory negligence, by reason of violation of defendant's rules, he should have been permitted to cross examine plaintiff as to his previous and continued violation of appellant's rules in the past. Gulf, C. & S. F. v. Rowland, 82 Texas, 166; Cunningham v. Austin & N. W. R. R. Co., 88 Texas, 535; Missouri, K. & T. Ry. Co. v. Johnson, 92 Texas, 383; 1 Shearman & Redfield on Negligence, note 1, pp. 345, 346; Peoria, etc., Ry. Co. v. Puckett, 52 Ill. App., 222.

Evidence that the witness had found the switch open many times, some nine months before the accident, was inadmissible, in the absence of testimony showing that conditions and circumstances at said time were the same as at the time of the accident, and that the same rules were in force. Sills v. Ft. Worth & D. C. Ry. Co., 28 S. W. Rep., 909; Texas & P. Ry. Co. v. Payne, 35 S. W. Rep., 299; Galveston, H. & H. R. R. v. Bohan, 47 S. W. Rep., 1050; Missouri, K. & T. R. R. Co. v. Wilder, 53 S. W. Rep., 490; Louisville & N. R. R. Co. v. Scanlon, 60 S. W. Rep., 643; 1 Shearman & Redfield on Negligence, p. 83, sec. 60 and authorities cited.

The court should have instructed the jury that in order for them to find that the rule was not in force at the time of appellee's injury and intended by the company to be observed by him, they must believe, from a preponderance of the evidence that said rule was habitually and constantly violated, to such an extent that appellant would be chargeable with notice of such violations. Shearman & Redfield on Neg., art. 205, p. 257; Benage v. Lake Shore, etc., Ry. Co., 102 Mich., 72; Francis v. Kansas City Ry. Co., 110 Mo., 387; Richmond & D. Ry. Co. v. Hisson, 97 Ala., 187; Galveston, H. & S. A. Ry. Co. v. Gormley, 91 Texas, 401.

If rule 104a had been in force and intended by appellant to be obeyed by its engineers, then a violation of the provisions by appellee under the facts of this case, was negligence per se, there being absolutely no phase of the case, justifying or excusing appellee in disregarding said rule. Galveston, H. & S. A. Ry. Co. v. Adams, 94 Texas, 106; Texas & N. O. Ry. v. Fields, 74 S. W. Rep., 930; Knight v. Cooper, 36 W. Va., 232; Louisville & N. Ry. Co. v. Woods, 105 Ala., 561; Cullen v. National S. M. Roofing Co., 114 N. Y., 45; Elliott v. Chicago, M. & St. P. R. R. Co., 150 U. S., 245; Galveston, H. & S. A. Ry. v. Brown, 63 S. W. Rep., 305; Dunlap v. Northeastern R. R. Co., 130 U. S., 649; San Antonio & A. P. v. Connell, 66 S. W. Rep., 247.

In order for appellee to recover it was incumbent upon him to show, by a preponderance of the evidence that rule 104a was so commonly and customary violated by the employees of appellant as to charge appellant with notice of said violations of the rule. Chandler v. Meckling, 22 Texas, 41; Willis v. Lewis, 28 Texas, 185; Galveston, H. & S. A. Ry. v. Bracken, 59 Texas, 75; Houston & T. C. Ry. v. Schmidt, 61 Texas, 282; Grinnan v. Dean, 62 Texas, 218; Dimmitt v. Robbins, 74 Texas, 441; Gulf, W. T. & P. Ry. Co. v. Abbott, 24 S. W. Rep., 299; Missouri P. Ry. Co. v. Somers, 78 Texas, 439; Brown v. Perez, 79 Texas, 157; Light v. Brown, 26 S. W. Rep., 886; Choate v. San Antonio & A. P.

Ry. Co., 90 Texas, 83; Louisville & N. Ry. Co. v. Scanlon, 60 S. W. Rep., 643.

John W. Parker and *S. L. Stapler,* for appellee.

EIDSON, Associate Justice.—In the former opinion in this case, the majority of this court held that the court below erred in not giving to the jury appellant's special charge No. 2. To this holding, Associate Justice Key dissented, and the question was certified to the Supreme Court which has answered the same, holding that the court below did not err in refusing to give to the jury said special charge. (Missouri, K. & T. Ry. Co. v. Parrott, 15 Texas Ct. Rep., 648.) In conformity with said holding of the Supreme Court we hold the action of the lower court in the respect above referred to was not error.

All the other questions presented in appellant's brief having been disposed of against its contention by the former opinion of this court, the judgment heretofore entered reversing and remanding the cause will be set aside and the judgment of the court below will be affirmd.

Affirmed.

OPINION ON MOTION FOR REHEARING.

As in the original opinion of this court in this case the appellant's assignments of errors insisted upon in its motion for rehearing of this cause as grounds for reversal of the judgment of the court below were overruled without discussion, and as counsel for appellant in the motion for rehearing request us to discuss and give our reasons for overruling said assignments, we will now proceed to do so.

The testimony, exclusion of which is complained of in the third assignment of error, was inadmissible. It was intended to show by the excluded testimony that appellee had on various other occasions been guilty of violating the rules of appellant, and, in effect, that he had habitually violated such rules and that accidents had resulted therefrom. This character of testimony was held to be inadmissible in the case of Railway v. Johnson, 92 Texas, 382, 383. Chief Justice Gaines, delivering the opinion in that case, uses this language: "We think the rule is well settled that when the question of whether or not a person has been negligent in doing or in failure to do a particular act, evidence is not admissible to show that he has been guilty of a similar act of negligence, or even habitually negligent upon a similar occasion"; citing among other cases that of Tenney v. Tuttle, 1 Allen, 185, and quotes as follows from that case: "When the precise act or omission of a defendant is proved, the question whether it is actionable negligence is to be decided by the character of that act or omission and not by the character for care and caution that the defendant may sustain."

The testimony, admission of which is complained of in the fifth and seventh assignments of error of appellant, was properly admitted. The fact that the time to which the testimony related was nine months prior to the date of the accident, would only affect the weight of the testimony and not its competency.

The matter to which the eighth assignment of error relates was practically submitted to the jury by the court in its general charge, in con-

nection with special charge No. 11, requested by appellant and given to the jury by the court; and if appellant desired a fuller or more specific instruction given to the jury on this subject, it was its duty to request same. And the writer also thinks there is force in the view contended for by appellee, that Rule 104a applies to a train of cars, and not to an engine separated from a train on a siding to be cleaned.

We do not think there was any error in the fifth paragraph of the court's charge complained of in appellant's tenth assignment of error. In our opinion the question as to whether appellee was guilty of negligence in violating Rule 104a, under the circumstances shown in this case, was one of fact for the determination of the jury. (Railway v. Adams, 94 Texas, 106; Railway v. Cornell, 69 S. W., 981, s. c. 6 S. W., 247.)

Appellant's seventeenth, eighteenth, nineteenth, twentieth and twenty-fourth assignments of error complain of the refusal of the court to give certain special charges requested by it to the jury. Each of these special charges makes the violation of the rule of appellant negligence *per se*, and for that reason was properly refused; and, besides, we think the court properly charged the jury as to the effect of the rule upon appellee's conduct in its main charge and the special charge given at the request of appellant.

The other assignments of error relied upon in appellant's motion for rehearing relate to the sufficiency of the evidence to support the verdict and judgment. While the testimony of appellee is, in some particulars, inconsistent and contradictory he testified to facts, if believed by the jury, sufficient to justify their verdict; and the fact that they found such verdict shows that they believed his testimony as to such facts. In our opinion the verdict and judgment are supported by the evidence.

The motion for rehearing is overruled.

Overruled.

Writ of error refused.

KATE L. GILBERT v. S. T. COOPER ET AL.

Decided May 30, 1906.

Suit to Set Aside a Judgment of Former Term—Necessary Averments.

A party seeking to reopen a case at a subsequent term must show that he was prevented from making a valid defense by fraud, accident, or the act of the opposing party, unmixed with fault or negligence on his part. Public policy demands that, in the absence of fraud on the part of his counsel, the party should be as fully concluded by the act of his attorney as if he were acting for himself, and the same doctrine applies to negligence or mistake of counsel.

Appeal from the District Court of Bandera. Tried below before Hon. R. H. Burney.

W. D. Love, for appellant.—Fraud is a sufficient ground for annulling the most sacred contracts, and is also a sufficient ground for setting aside judgment most solemnly rendered.

On general demurrer plaintiff's allegations are taken as true, and when the allegations charge that by reason of fraud plaintiff has been deprived of property rights, it is error to sustain a general demurrer. Kellum v.

Smith, 18 Texas, 850; Johnston v. Loop, 2 Texas, 335; Norwood v. Cobb, 15 Texas, 505; Buchannan v. Bilger, 64 Texas, 593.

I. L. Martin, for appellees.—That the general demurrer was properly sustained, cited: Johnson v. Templeton, 60 Texas, 238; Merrill v. Roberts, 78 Texas, 28; Montgomery v. Carlton, 56 Texas, 434; Contreras v. Haynes, 61 Texas, 103; Union Life Insurance Co. v. Lipscomb, 27 S. W. Rep., 307; Dempsey v. Taylor, 4 Texas Civ. App., 130; Holliday v. Holliday, 72 Texas, 585; Watts v. Bruce, 72 S. W. Rep., 258.

FLY, ASSOCIATE JUSTICE.—This is an action instituted by appellant to set aside a judgment decreeing certain lands to appellees. The judgment was rendered in favor of appellees, and against appellant on September 6, 1904, and this suit was instituted on August 18, 1905. It was alleged that appellees instituted suit against appellant on February 9, 1904, in the District Court of Bandera County, for 640 acres of land and that judgment was rendered that the appellees should recover on their pleas of limitation as set forth in their petition. That judgment was agreed to by appellant's attorney. The circumstances under which it was rendered are thus alleged: "That this plaintiff secured the services of an attorney, viz.: W. D. Love, Esq., to defend said suit, and defend her interests in said lands. That at the September, 1904, term of this court said attorney, W. D. Love, was present, and prepared to defend this plaintiff's title to the land sued for. That said attorney questioned a number of persons then living in the vicinity of said lands, and who said attorney had reason to believe, and did believe, were cognizant of the facts, as to whether or not said land was in the actual possession, by being enclosed with a fence, by the plaintiffs in said suit. That among said persons so questioned were John Bargeley, W. B. Burdett and J. W. Dulaney, one of the plaintiffs in said suit. That all of the persons questioned by plaintiff's said attorney stated that the land was then enclosed with a fence, and had been so enclosed by said Cooper, and Dulaney, and their vendors for a period of more than ten years. Said attorney then asked said J. W. Dulaney, if what he had stated with reference to said land being fenced, and having been so fenced for ten years, next preceding the filing of their said petition, would be sworn to by him on the trial of the case, and said Dulaney stated to said attorney, W. D. Love, in response to said inquiry, that such would be his testimony on the stand.

"That said attorney was ignorant of the facts, with reference to whether or not said land was fenced, and had been fenced and was compelled to rely on the testimony of other parties with reference to such facts. And having confidence in the integrity and veracity of said John Bargeley, W. B. Burdett and J. W. Dulaney, he did rely on their said statements, and did believe that said land was enclosed with a fence, and had been so enclosed for more than ten years next preceding the filing of said petition. That said attorney, relying upon said statements, and believing that said land had been enclosed by a fence and thus in the possession of said S. T. Cooper, and said J. W. Dulaney and their vendors for more than ten years, said possession being adverse to this plaintiff, by reason of its being so fenced; that the said S. T. Cooper, and

J. W. Dulaney in their petition, plead both the five years, and ten years statute of limitation, and plaintiff's said attorney, relying upon said statements and believing that said land had been enclosed by a fence, and thus in the possession of said Cooper and Dulaney, and their vendor's for more than ten years, said possession being adverse to this plaintiff by reason of its being so fenced, said attorney W. D. Love, agreed that plaintiffs in said suit should have judgment for the lands claimed by them, said judgment to recite that it was recovered on their plea of limitation. And in pursuance of said agreement between said attorney W. D. Love, acting for and in behalf of this plaintiff, and said S. T. Cooper and J. W. Dulaney, and their attorney, George Powell, Esq., the following judgment was taken in said cause, and duly entered, without evidence and without a trial. . . .

"Plaintiff further shows to the court that said statements made by said John Bargeley, W. B. Burdett and J. W. Dulaney, with reference to said lands being fenced, and having been enclosed with a fence for more than ten years, was and were untrue, were false, and were fraudulent upon plaintiff's rights to said land. That had it not been for such false and fraudulent statements, whereby plaintiff's said attorney was deceived and misled, that he would have contested the claims of said Cooper and Dulaney to said lands. Plaintiff further avers that said land was not enclosed with a fence at the date of the filing of said Cooper and Dulaneys' petition, was not enclosed at the date said judgment was taken, and had not been so enclosed by them and their vendors for the ten years preceding the filing of their said petition, and was not in their adverse possession so as to entitle them to a judgment for said land on their plea of limitation, either of the ten years plea, or the five years plea. That plaintiff and defendant claim under different grants, and that the grant under which plaintiff claims is prior in point of time to that under which defendants claim.

"That this plaintiff's title to said land is superior to the title of the S. T. Cooper and J. W. Dulaney, or either of them and that on a trial in trespass to try title, to same, this plaintiff is prepared to show to the court that her legal title to said land is superior to the title of said S. T. Cooper and J. W. Dulaney, or either of them."

The court sustained a general demurrer to the petition, and appellant declining to amend, the cause of action was dismissed.

In the judgment originally rendered in the cause it is recited that evidence was heard and it was adjudged that the plaintiffs "should recover upon their pleas of limitation." There is no allegation in the petition that there was any fraud in connection with any limitation except that of ten years. The land might not have been enclosed and still title have been perfected by five years limitation.

It will be presumed that all facts necessary to sustain the judgment were proved in the original cause and in order to obtain a basis for reopening the case, the party seeking it must show that he was prevented from making a valid defense by fraud, accident or the act of the opposing party, unmixed with fault or negligence on his part. (Vardeman v. Edwards, 21 Texas, 737; Plummer v. Power, 29 Texas, 7; Johnson v. Templeton, 60 Texas, 238; Merrill v. Roberts, 78 Texas, 28; Harn v. Phelps, 65 Texas, 592; McGloin v. McGloin, 70 Texas, 634; Brown-

son v. Reynolds, 77 Texas, 254; Weaver v. Vandervanter, 84 Texas, 691; Smith v. Patrick (Texas Civ. App.), 43 S. W. Rep., 535.)

In all the cases cited it is distinctly stated that not only must fraud, or accident be clearly averred and proved, but it must be shown in addition that there was no negligence on the part of the complaining party. As said in the case of Brownson v. Reynolds, before cited: "It is a rigid rule that courts of equity will not grant a party to a judgment a new trial when the failure to have a full and fair presentment of his case has resulted from the negligence or mistakes of his counsel. Public policy demands that in the absence of fraud on the part of his counsel the party should be as fully concluded by the act of his attorney as if he were acting for himself."

According to the allegations the attorney of appellant questioned a number of persons about the possession of the land by appellees and that all of them stated that the land had been enclosed by a fence by appellees and their vendees for more than ten years. The only parties named, as making that representation, were John Bargeley, W. B. Burdett and one of the appellees, and it was stated that it was their representation that caused appellant's attorney to agree to a judgment against his client. Outside of questioning persons about the land, no effort was made by the attorney to ascertain the truth of their representations. Where such vital interests of the client were at stake, either the attorney should have gone to the land and ascertained the facts, or he should have sent some reliable person to ascertain them. He should not have gone into the camp of the enemy to seek for the truth about the attacks being made upon the title of his clients, and should not have let her rights rest upon the unsworn statements of the neighbors of her adversary. If, as alleged, the land was not fenced when the presentations were made, that fact could have been easily ascertained, and appellant, having an opportunity to make that examination, she is charged with the knowledge that would have been obtained by such examination.

It is not stated how long the court lasted after the judgment and no statement made that would go to show that appellant did not ascertain the facts during the term of the court at which the judgment was rendered. Nor is there any effort to show that any diligence whatever was exercised to detect the fraud. It does not appear from the petition when the falsity of the representations was ascertained.

Relief will not be granted in cases of this character, unless it clearly appears that the party seeking it has a good defense to the action, which he has been prevented from making by fraud, accident or the acts of the other party. He must not only show to the court that he has not obtained justice and equity, but he must also make it manifest that a different result will be attained on another trial.

The representations made to the attorney of appellant were nothing more than what was alleged in the petition in regard to limitations and he knew that was the title depended on by them and he ought to have inquired into and acquainted himself with such in order to represent his client. (Watts v. Bruce (Texas Civ. App.), 72 S. W. Rep., 258.)

We think the petition was also subject to general demurrer because it did not set out the chain of title relied upon by appellant. There was nothing alleged but that "the grant under which plaintiff claims is prior

in point of time to that under which defendant claims," and "that plaintiff's title to said land is superior to the title of S. T. Cooper and J. W. Dulaney, or either of them, and that on a trial in trespass to try title to same, this plaintiff is prepared to show to the court her legal title to said land is superior to the title of said S. T. Cooper and J. W. Dulaney, or either of them." The allegations were merely conclusions or opinions of the pleader, and did not set forth any facts by which the meritorious character of the title could be judged. (Montgomery v. Carlton, 56 Texas, 431; Contreras v. Haynes, 61 Texas, 103; Sharp v. Schmidt, 62 Texas, 263; Holliday v. Holliday, 72 Texas, 581; Dempsey v. Taylor, 4 Texas Civ. App., 130.) The petition was not verified by affidavit. As said in Holliday v. Holliday: "Enough should be stated, supported by affidavit, to show at least a *prima facie* case."

The judgment is affirmed.

Affirmed.

JUNE, 1906.

HENRY FREEMAN ET AL. v. SARAH B. JONES ET AL.

Decided June 1, 1906.

1.—Deed, not Testamentary.

An instrument containing the usual formal parts of a deed, and containing also a stipulation that the conveyance is in trust for a third party, naming her, and giving the grantee or trustee power to sell, dispose of or convey the premises if in his judgment it was for the interest of the beneficiary so to do, but stipulating also that the premises conveyed should not be sold during the lifetime of the grantor except at her request or with her consent, is essentially a deed and took effect upon delivery.

2.—Same—Consideration.

An undertaking on the part of a grantee of real estate to keep the taxes paid, the premises in repair and to supply the needs of the grantor, shown to be between 55 and 80 years of age, during her life, is a sufficient consideration to support a deed for property of the value of $2,000.

Appeal from the District Court of Harris County. Tried below before Hon. W. P. Hamblen.

Stanley Thompson, for appellants.—The instrument signed and executed by Martha Ann Milby to J. W. Jones, trustee, did not absolutely convey the property, but especially provided that the same should not be sold during her lifetime without her consent, thereby giving her the control of the title until her death. Carlton v. Cameron, 54 Texas, 74; Rogers v. Kennard, 54 Texas, 35; Ellison v. Keese, 25 Texas Sup., 84; Millican v. Millican, 24 Texas, 426; Veal v. Fortson, 57 Texas, 488; Hazelton v. Reed, 26 Am. St. Rep., 86; 1 Dev. on Deeds, sec. 309; 1 Redf. on Wills, 4th ed., 170-172; McKinnon v. McKinnon, 46 Fed. Rep., 722.

The deed from Martha Ann Milby to J. W. Jones, trustee, was void for the reason that at the time the same was made J. W. Jones was the

attorney and legal adviser and confidential friend of the said Martha Ann Milby, and he paid no adequate consideration for the property. Cooper, Administrator, v. Lee, 75 Texas, 114; Waterbury v. Laredo, 68 Texas, 577; Allore v. Jewell (U. S.), 4 Otto, 511.

Brashear & Dannenbaum, for appellees.—The deed from Martha Ann Milby to J. W. Jones, trustee, absolutely conveyed the title to the property, and was not testamentary in its nature. Revised Statutes, 1895, art. 632; Jenkins v. Adcock, 5 Texas Civ. App., 466; Martin v. Faries, 55 S. W. Rep., 601; Carpenter v. Hannig, 34 S. W. Rep., 774; Matthews v. Moses, 52 S. W. Rep., 113; Leslie v. McKinney, 38 S. W. Rep., 378; Lockridge v. McCommon, 90 Texas, 236; Bombarger v. Morrow, 61 Texas, 418; Chrisman v. Wyatt, 7 Texas Civ. App., 40; 9 Am. & Eng. Ency. of Law (2d ed.), p. 92.

A deed executed in consideration that the grantee shall pay all taxes on the place and maintain the same, and allow the grantor to live on the place during her life, is based on a good and valuable consideration. Mayer v. Swift, 73 Texas, 368, 369; Moore v. Cross, 87 Texas, 561.

GILL, CHIEF JUSTICE.—Henry Freeman and his coplaintiffs as the heirs of Martha Ann Milby, deceased, brought this suit against Sarah B. Jones, trustee, Irma Jones, George Anderson and T. F. Loftus, to recover the title and possession of parts of lots 6 and 7 in block 337, of the city of Houston. The form of the action was trespass to try title.

The defendants Loftus and Anderson disclaimed. Sarah B. and Irma Jones answered by general denial and plea of not guilty, pleaded valuable improvements in good faith and asked for affirmative relief.

There was a trial by jury which resulted in a general verdict for defendants, followed by an appropriate judgment, from which the plaintiffs have appealed.

The plaintiffs are the heirs at law of Martha Ann Milby, deceased, and claim the land in controversy under the laws of descent and distribution.

Sarah B. Jones holds the land as substitute trustee under a deed from Martha Ann Milby, Irma Jones being the *cestui que trust.*

The deed is assailed by plaintiffs upon two grounds: First, because the maker was *non compos mentis* at the time of its execution; and second, because it was obtained by undue influence, and for an inadequate consideration. Upon the establishment of one or the other of these two contentions depends the plaintiffs' case.

The facts bearing upon the execution of this deed are as follows:

Martha Ann Milby was a negro woman advanced in years at the date of the execution of the deed. The witnesses estimate her age at that time at from 55 to 80 years. The evidence is ample to support the conclusion that she was of sound mind, and the assignments addressed to that issue are overruled.

J. W. Jones was a member of the Houston bar and was the attorney, friend and adviser of deceased, who owned the property in question and occupied a small house thereon as her home. She was earning a livelihood by washing and cooking. She had been sued for taxes and did not have the money wherewith to discharge them and as the property was

under threat of sale therefor she was fearful of losing her home. She finally decided to deed the property to some responsible person in consideration that it should be kept in repair and her wants supplied. She made this proposition to two or three people who declined to accept it. Finally she went to J. W. Jones and made the proposition that he should accept a deed conveying the land to him for the benefit of his daughter, Irma, in consideration that she, the vendor, should occupy the place for the remainder of her life, he to supply her needs and keep the place in repair and pay the taxes while she lived. After much insistence on her part Jones accepted the proposition and the deed was executed and delivered. Jones thereupon paid the taxes on the property, kept it in repair, put in sewerage and water works for her, and he, during his lifetime, and his wife after him, supplied Martha Ann Milby with what she needed, paid her doctor's and medical bills, furnished a nurse for her for three months before she died, and when she died she was buried at Mrs. Jones' expense. One of the considerations which appeared to move Martha Ann Milby to the execution of the deed was her love and affection for Irma Jones, whom she had nursed when a child, but the court did not permit the jury to consider this as a part of the consideration upon which the deed rested. The instrument was dated August, 1898, and Martha Ann Milby died in the spring of 1903. At the date of the deed she had no immediate family and was on unfriendly terms with her relatives. The property at that time was worth about $2,000.

Appellants contend that the instrument under which appellees claim the land is testamentary in its character and because not executed as required by law for the execution of wills can form the basis of no right.

The material parts of the instrument are as follows:

"Know all men by these presents, that I, Martha Ann Milby, a *feme sole,* of the county and State aforesaid, for and in consideration of one ($1.00) dollar, to me in hand paid by J. W. Jones, the receipt of which is hereby acknowledged, and for other good and sufficient considerations me thereunto moving, have granted, sold and conveyed, and by these presents do grant, sell and convey, unto the said J. W. Jones . . . (here follows description).

"To have and to hold the above described premises, together with all and singular the rights and appurtenances thereunto in any wise belonging unto the said J. W. Jones, his heirs and assigns forever. And I do hereby bind myself, my heirs, executors and administrators, to warrant and forever defend all and singular the said premises unto the said J. W. Jones, his heirs and assigns, against every person whomsoever lawfully claiming or to claim, the same, or any part thereof.

"This conveyance is made by me to said J. W. Jones as trustee, in trust for the sole and exclusive use, benefit and advantage of his daughter, Irma Jones, and her heirs and assigns forever, and I hereby authorize and empower the said J. W. Jones, trustee, to manage and control the premises herein conveyed, and to do any and everything in and about and with said premises, as in his judgment he may deem best and proper for the said Irma Jones, and rent, sell, dispose of and convey the same, as in his judgment may be for the best interest of the said Irma Jones, provided said premises shall not be sold during my lifetime by the said J. W. Jones, trustee, unless at my request, or with my con-

sent. In the event of the death of said J. W. Jones before the arrival at 21 years of age of the said Irma Jones, or before she marries, then and in that event, Sarah B. Jones, the wife of said J. W. Jones, and mother of said Irma Jones, is hereby appointed and constituted as the trustee of said property for said Irma Jones under this deed, and the said Sarah B. Jones shall, in that event, have, possess and be entitled to, and is hereby invested with all the trusts, rights, powers and duties hereby vested in and conveyed on the said J. W. Jones. When said Irma arrives at the age of 21 years, or marries, if said property has not before that time been sold by said J. W. Jones or Sarah B. Jones, then and in that event the sole and exclusive control, management, ownership and disposition of said property shall vest absolutely in the said Irma Jones, her heirs and assigns."

We think it clear that the instrument was essentially a deed reserving certain rights to the grantor during her life and took effect upon delivery. In support of this holding we cite without further discussion the following authorities: Revised Statutes, art. 632; Jenkins v. Adcock, 5 Texas Civ. App., 466; Martin v. Faries, 55 S. W. Rep., 601; Chrisman v. Wyatt, 7 Texas Civ. App., 40; Lockridge v. McCommon, 90 Texas, 236; Bombarger v. Morrow, 61 Texas, 418.

The next objection to the judgment is that J. W. Jones was the confidential friend and legal adviser of deceased and that therefore undue influence would be presumed. The complete answer to this is that undue influence is negatived by the record. The evidence supports the conclusion that Jones accepted the deed unwillingly and after insistence on the part of deceased. It is also true that a fair consideration was shown. Resolving the issue of the age of deceased in favor of the verdict, the undertaking of Jones to keep the taxes paid, the premises in repair, and to supply the needs of deceased during her life was one which might have become very onerous had she lived to a great age and one which might have easily equaled the value of the property had she lived out her reasonable expectancy. That such an undertaking is sufficient consideration for such a deed is a proposition well sustained by authority. (Mayer v. Swift, 73 Texas, 368; cited with approval in Moore v. Cross, 87 Texas, 561.) The transaction being affirmatively shown to be fair and free from improper influence should be upheld.

The several objections to the charge of the court are without merit. They need not be disposed of in detail. Nor is it necessary in view of the disposition of this appeal to notice the cross-assignments of error.

The judgment is affirmed.

Affirmed.

TILT-KENNEY SHOE COMPANY v. C. S. HAGGARTY ET AL.

Decided June 1, 1906.

1.—Guarantor of Account—Rights and Liabilities.

Plaintiffs addressed the following letter to one of the defendants: "We have an order amounting to $142.50 from C. S. Haggarty, of Beaumont, Texas, whom, we understand, you are backing. As Mr. Haggarty is a new man in the business, and seems to have no financial standing at present, will you kindly guarantee the payment of this bill? Kindly let us hear from you." Upon re-

ceipt of said letter the addressee wrote upon the same the following: "O. K., George Adams, Sr.," and returned it to the plaintiffs; thereupon the goods were shipped to H. Held, that by said endorsement Adams became originally and unconditionally responsible for the payment of the debt, and was not entitled to notice of default on the part of H., nor of acceptance on the guaranty, nor was any diligence necessary on the part of plaintiffs to fix his liability.

2.—Payment—Proof.

Payment is a defense which must be pleaded and proven by the defendant.

Appeal from the County Court of Jefferson County. Tried below before Hon. D. P. Wheat.

Crook & Harris and *I. W. Lawhon,* for appellant.—A guaranty is absolute when the terms of the contract, read in the light of surrounding circumstances, show that the credit was extended solely on the faith of such guaranty, and that it is an original and personal undertaking on the part of the guarantor to perform the obligation of a third party, if such third party fails to perform according to the terms of his contract. Tobin Canning Co. v. Fraser, 17 S. W. Rep., 25; 14 Am. & Eng. Ency. of Law, p. 1141; Cowan, McClung & Co. v. Roberts (N. C.), 65 Law Rep. Ann., 729; Nading v. McGreoger (Ind.), 6 Law Rep. Ann., 686; Wright v. Griffith (Ind.), 6 Law Rep. Ann., 639.

Where a guaranty is made at the request of the creditor, and the guarantor accepts the creditor's offer, the guarantor is not entitled to notice of the acceptance of his guaranty. Hart v. Wynne, 40 S. W. Rep., 848; Lemp v. Armengol, 26 S. W. Rep., 941; Davis v. Wells Fargo Co., 104 U. S., 159; The Law of Suretyship (Stearns), p. 82; 14 Am. & Eng. Ency. of Law, p. 1145, 1146.

When a guaranty is absolute, the guarantor is not entitled to notice of the acceptance of his guaranty, or notice of the default of the principal debtor. McCormick Harvesting Mach. Co. v. Millett, 29 S. W. Rep., 80; Tobin Canning Co. v. Fraser, 81 Texas, 407; Shropshire v. Smith, 37 S. W. Rep., 174; 14 Am. & Eng. Ency. of Law, pp. 1141, 1149; The Law of Suretyship (Stearns) pars. 61, 67; Read v. Cutts (Maine), 22 Am. Dec., 184.

Where suit is brought on an absolute guaranty, it is not necessary for the guarantee to show that the principal debtor has made default in payment in order to hold the guarantor liable. Shropshire v. Smith, 37 S. W. Rep., 174; McCormick Harvesting Mach. Co. v. Millett, 29 S. W. Rep., 80; 14 Am. & Eng. Ency. of Law, p. 1150; The Law of Suretyship (Stearns), par. 61.

It was not necessary for plaintiff to prove that C. S. Haggarty had not paid the debt. It was the duty of appellee to specially plead and prove such payment, if he claimed that it has been made. Revised Statutes, art. 1266; Hander v. Baade, 40 S. W. Rep., 422; Gray v. McFarland, 29 Texas, 169; Nugent & Co. v. Martin, 1 Texas Ct. App. Civil Cases, p. 670.

PLEASANTS, ASSOCIATE JUSTICE.—Appellants brought this suit in the Justice Court of Precinct No. 1, Jefferson County, against C. S. Haggarty and George Adams to recover the sum of $132 alleged to be due

for goods sold and delivered to Haggarty. Judgment was sought against Adams under allegations charging that he had guaranteed in writing the payment of said sum.

The trial in the Justice Court resulted in a judgment in favor of plaintiffs against Haggarty, and in favor of Adams that plaintiffs take nothing against him. Upon appeal and trial *de novo* in the County Court like judgment was rendered.

The evidence shows that before appellants shipped the goods to Haggarty they addressed the following letter to appellee Adams:

"Chicago, April 29, 1903.

Mr. George Adams,
Beaumont, Texas.

Dear Sir: We have an order amounting to $142.50 from C. H. Haggarty of Beaumont, Texas, whom we understand you are backing. As Mr. Haggarty is a new man in the business, and seems to have no financial standing at present, will you kindly guarantee the payment of this bill? Kindly let us hear from you.

(Signed) Tilt-Kenney Shoe Co."

Upon receipt of this letter appellee wrote just beneath the signature of appellant the following: "O. K. George Adams, Sr." Appellee returned this letter to appellant, who upon receipt of same filled the order and shipped the goods to C. S. Haggarty. It was agreed that "this shipment was made on the faith of the guaranty of Geo. Adams and that had it not been for said guaranty, plaintiff would not have extended credit to C. S. Haggarty; that the bill of goods Geo. Adams guaranteed is the one plaintiff is suing on therein, and that this is the only bill of goods ever shipped by plaintiff to C. S. Haggarty."

The trial court held that the liability of Adams under his guaranty was secondary, and he was therefore entitled to notice of acceptance of the guaranty, and notice of default by Haggarty, and that the plaintiff having failed to show that the account had not been paid by Haggarty, no judgment could be rendered against Adams.

These holdings are all erroneous. The letter of appellant to Adams informed him in effect that the goods would be shipped to Haggarty if he, Adams, would gurantee the payment of the purchase price, and requested him to let them know if he would give such guaranty. The endorsement made by Adams upon this letter, which he at once returned to appellant, must be regarded as an agreement by him to guarantee the payment of the price of the goods. The goods having been shipped to Haggarty upon the faith of this guaranty, Adams liability became thereby fixed. and he was not entitled to notice of the acceptance of the guaranty. (Hart v. Wynne, 40 S. W. Rep., 848; 14 Am. & Eng. Ency. of Law, p. 1146.) Being originally and unconditionally responsible for the payment of the debt, Adams was not entitled to notice of default on the part of Haggarty, and no diligence was required on the part of appellant to fix his liability. (Tobin Canning Co. v. Fraser, 81 Texas, 407; McComack Harvesting Co. v. Millett, 29 S. W. Rep., 80.)

The appellant was not required to prove that the account had not been

paid. Payment is a defense which must be pleaded and proven by the defendant. (Rev. Stats., art. 1266; Hander v. Baade, 16 Texas Civ. App., 121.)

The facts being undisputed, the judgment of the court below should be reversed and judgment here rendered in favor of appellant against Adams, and it has been so ordered.

Reversed and rendered.

OKLAHOMA CITY & TEXAS RAILROAD COMPANY v. J. A. SCARBOROUGH.

Decided June 2, 1906.

Operation of Railroads—Annoyance of Adjacent Residents.

Railroad companies, in the absence of evidence that their business is improperly or negligently conducted, are not liable in damages to adjacent residents for personal annoyance, discomfort or inconvenience necessarily resulting from and incident to the lawful operation of their trains and locomotives along the streets of a town. It is otherwise as to injury to property.

Appeal from the District Court of Hardeman County. Tried below before Hon. S. P. Huff.

C. H. Yoakum and *D. E. Decker,* for appellant.—A petition which alleges damages for personal inconvenience to the owner of abutting property on a railway right of way, who was occupying the same as a residence, in addition to alleging damages occasioned by depreciation in market value of the property, is subject to a special exception on the grounds that the petition fails to allege that the railway, sidings and depot are improperly constructed or are negligently operated, or that necessity for such construction did not exist. St. Louis, S. F. & T. Ry. Co. v. Shaw, 92 S. W. Rep., 30; Denison, B. & N. O. Ry. Co. v. Barry, 83 S. W. Rep., 4.

SPEER, ASSOCIATE JUSTICE.—Appellee, as plaintiff below, instituted this suit against appellant to recover damages, and in his first amended original petition, upon which the trial was had, alleged "that the operation of defendant's cars and engines over said tracks is necessarily attended with great and annoying noises and with the emission of smoke, ashes, cinders, soot, foul odors and dirt from defendant's engines, which fall upon plaintiff's said property to the great discomfort, inconvenience and annoyance of those who have occupied and who occupy plaintiff's said property. . . . That the immediate and necessary effect of the construction of said depot, cotton platform and tracks, and of the operation of trains, cars and engines on said tracks over said avenue and said adjacent strip of land, has been to depreciate the market and intrinsic value of plaintiff's said property in the sum of $750. That between said April 1, 1903, and July 1, 1904, the great and annoying noises, the emission of smoke, ashes, cinders, soot, foul odors and dirt from defendant's engines in the operation of its engines, cars and trains as aforesaid, had the effect necessarily to injure and destroy to him and his family the use and enjoyment of plaintiff's said property as his homestead to his damage in the further sum of $500." For these sums be prayed judgment. Ap-

pellant interposed a special exception to that part of appellee's pleadings which seeks to recover damages for personal inconvenience to himself and family, because it is nowhere alleged that it had been in any manner negligent in the construction of its tracks, depot and other structures complained of, or in the operation of its trains. This exception, which was overruled, presents the first and only question for our determination.

The holding of our Supreme Court in St. Louis, S. F. & T. Ry. Co. v. Shaw, 92 S. W. Rep., 30, is decisive of this question in favor of appellant. In that case the plaintiff recovered damages for the annoyance and discomfort to herself occasioned by the defendant's carrying on its railroad business, resulting in the invasion of her home by noises, dust, odors, etc., and in disposing of the case Mr. Justice Williams for the court said: "There is no evidence that defendant's business was in any way improperly or negligently conducted, or that the number of tracks, engines and cars employed by it was greater than was necessary to properly perform its duties to the public at this freight depot, or that in the operation of these things more noises, dust, cinders, odors, etc., were produced than would necessarily attend such operations properly conducted. The case is an attempt to establish a liability for that which is the usual and ordinary operation of the business in a reasonable manner. There is evidence that annoyance and discomfort were caused the plaintiff in her home, and if this were enough to make out a case for such damages, this court could not interfere with the verdict of the jury. . . . Here, the defendant in the location of its right of way, its main track, its freight depot and such sidings and spurs as were necessary to the proper carrying on of its freight business and the discharge of its duties therein, did only that which the law authorized it to do. In other words, for the public good its action in those regards, so long at least as it was only a reasonable exercise of the privilege granted, was made lawful; and any incidental damage resulting to members of the public, beyond that caused to their property, against which they are protected by the constitution, is to be regarded as *damnum absque injuria,* which must be borne because the work which inflicts it is authorized by law for the general welfare." This aptly applies to the present case, since appellee's pleadings not only did not allege negligence, but, as above shown, did allege that the annoyance and inconvenience complained of were the immediate and necessary effects of appellant's business. The exception should have been sustained, and for the error of the court in overruling it, the judgment is reversed and the cause remanded.

Reversed and remanded.

I. W. MORRISON ET AL. v. C. C. MORRISON ET AL.

Decided June 2, 1906.

1.—Gift or Advancement—Presumption—Evidence.

In the absence of a will or of circumstances sufficient to show otherwise a gift of money by a parent to a child is presumed to be an advancement.

2.—Same.

Evidence considered, and held to show an intention on the part of an intestate to give to one of her children an amount of money in excess of the

interest of such child in her estate, but no intention that such child should retain the money so given and share equally with the other heirs in the remainder of the estate.

Appeal from the District Court of Cooke County. Tried below before Hon. D. E. Barrett.

Davis & Thomason, for appellants.—The court erred in not holding that the defendant C. C. Morrison should be charged with the money received from his mother, and applied by him towards the payment of the vendor's lien upon his homestead, and made to account therefor as an advancement, and in permitting the said C. C. Morrison to share equally with his brothers and sisters and their descendants in the remainder of his mother's estate. Rev. Stats., art. 1694; Lott v. Kaiser, 61 Texas, 668; Woessner v. Wells, 28 S. W. Rep., 249; Williams on Executors, vol. 2, p. 1274; Hatch v. Straight (Conn.), 8 Am. Dec., 152; Grattan v. Grattan (Ill.), 65 Am. Dec., 726; Goodwin v. Parnell (Ark.), 65 S. W. Rep., 427; Nichols v. King (Ky.), 68 S. W. Rep., 133; Reynolds v. Reynolds (Ky.), 18 S. W. Rep., 517; Steele v. Friarson (Tenn.), 3 S. W. Rep., 652; "Cyc" vol. 14, p. 162, 169.

Culp & Giddings, for appellees.—The question whether a transaction between parent and child is to be treated as an advancement or as an absolute gift is one of fact, depending upon the intention of the parent. Any presumption that it is an advancement may be rebutted by evidence showing that it was intended as an absolute gift. Sparks v. Spence, 40 Texas, 694; Gunn v. Thurston, 32 S. W. Rep., 654; 1 Am. & Eng. Ency. of Law, 771-776; Bay v. Cook, 31 Ill., 336; Duling v. Johnson, 32 Ind., 155; Creed v. Lancaster Bank, 1 Ohio St. Rep., 1; Clements v. Hood, 57 Ala., 463.

CONNER, CHIEF JUSTICE.—Appellants I. W. Morrison, Thomas H. Morrison, H. A. Morrison and Jane A. Minnie, sons and daughter of Mrs. N. A. Morrison, deceased, joined by the children of a Mrs. Hemphill and a Mrs. Oller, also daughters of the deceased, instituted this suit in the District Court of Cooke County against the appellee C. C. Morrison, the remaining child of Mrs. N. A. Morrison, to recover an interest in the estate of the deceased and to charge as against appellee C. C. Morrison and his wife, also joined in the suit, the sum of nine hundred dollars, which it was alleged appellee C. C. Morrison had used in paying a vendor's lien upon his homestead. The trial, which was before the court, resulted in a judgment in favor of appellants for the sum of $81.33, which had been tendered by appellee and was in the hands of the clerk, from which judgment an appeal has been prosecuted.

The sole question presented is, whether the judgment is supported by the facts. It is undisputed that the deceased, who was a widow eighty-four years of age, sold her farm in Cooke County on the 26th day of June, 1905, for the sum of $3,066.65 in cash. This farm constituted her entire estate and was paid for by the purchaser in a check for the amount stated on one of the national banks of the city of Gainesville. After mutations not necessary to notice here, appellee had this amount placed

to his credit upon the books of another one of the banks in said city, and on July 27, 1905, drew therefrom the sum of $900, with which, together with some $300 of his own money, he discharged a debt secured by vendor's lien upon his homestead. On the same day he also withdrew the further sum of $166.65, which appellee C. C. Morrison testifies he gave to his mother, but which (save the amount tendered to appellants in court) he testifies was expended in the payment of her funeral expenses.

Six-sevenths of the remaining $2,000 of the fund appellee afterwards divided among his said brothers and other heirs of the deceased, himself retaining one-seventh. It further appears that Mrs. N. A. Morrison, the mother, who was a resident of Cooke County, died intestate on the 29th day of July, 1905, owing no debts, and that there has never been any administration upon her estate, nor any necessity therefor. Mrs. Zulah Morrison, the daughter-in-law of the defendant C. C. Morrison, testified: "My husband and I stayed at C. C. Morrison's on the night of the 26th of July. We sat up with Grandma Morrison. I just happened into the room when they brought the check to her to sign. My husband had already written the check. Grandma Morrison was in bed at the time. We propped her up in bed to sign the check. I heard her tell Mr. Morrison (C. C.) to pay his land notes off. I saw her sign the check. She said she thought she would get well, and be able to go west to see her grandchildren out there. The check was signed before breakfast. C. C. Morrison propped her up in bed, and she signed the check. Sometime during the morning on which she signed the check, I heard her tell Mr. C. C. Morrison to pay his land out. That was all I heard her say. I did not hear her say what she wanted done with the balance of the money."

Luther Morrison, the husband of Mrs. Zulah Morrison, testified:

"I saw Mrs. N. A. Morrison sign the check for three thousand and sixty-six dollars and sixty-five cents. She was sitting in the bed propped up at the time. Grandma said she wanted C. C. Morrison to pay his place out, and to put one thousand dollars in the Whitesboro Bank, and one thousand dollars in the Sherman Bank, and bring her the balance. She said for him to pay nine hundred dollars on his place and bring her one hundred and sixty-five dollars. She said be sure and pay your place out. I believe I am going to get well, but if I should die, you would not get it, and I have given you the money and want you to have it."

The question presented is, in substance, whether under the foregoing facts and some other evidence hereinafter referred to, appellee C. C. Morrison was entitled to retain the nine hundred dollars given to him by his mother and also to receive a distributive share of one-seventh of the remainder of his deceased mother's estate. We think not, and that the court below erred in so finding and adjudging.

Revised Statutes, article 1694, provides that "where any of the children of a person dying intestate, or their issue, shall have received from such intestate, in his lifetime any real, personal or mixed estate by way of advancement, and shall choose to come into the partition and distribution of the estate with the other distributees, such advancement shall be brought into hotchpotch with the whole estate, and such party returning such advancement shall thereupon be entitled to his proper portion

of the whole estate; provided, that it shall be sufficient to account for the value of the property so brought into hotchpotch at the time it was advanced." If, therefore, the nine hundred dollars from his mother's estate was received by appellee C. C. Morrison "by way of advancement," he must, before being entitled to participate with other heirs in the distribution of the entire estate, return the same that it may be brought into hotchpotch with the whole estate. It hence becomes important to determine from the evidence whether appellee C. C. Morrison received said nine hundred dollars by way of advancement within the meaning of the statute, or, as appellees insist, as an "absolute gift." We think it clear from the authorities that in the absence of circumstances showing a contrary intention, a gift by a parent to a child of money, such as shown in this case, is presumed to be an advancement. (See Lott v. Kaifer, 61 Texas, 668; Woessner v. Wells, 28 S. W. Rep., 249; Williams on Executors, vol. 2, p. 1274; Richenback v. Zimmerman, 38 Am. Rep., 37; Goodman v. Parnell, 65 S. W. Rep., 427; Nichols v. King, 60 S. W. Rep., 133; Reynolds v. Reynolds, 18 S. W. Rep., 517; Steele v. Friarson, 3 S. W. Rep., 652; Cyc., vol. 14, pp. 162, 169.) During life, by proper transfer or will a person may dispose of his property as he pleases. He may thus disinherit or prefer one child above another. But in the absence of a will, and in the absence of circumstances sufficient to show otherwise, the presumption referred to obtains. The presumption as well as the statute quoted, tends to produce, as near as may be, equality in the distribution of the estate of an intestate and is evidently equitable. The utmost effect that we think can be given to the evidence in his case is to hold that Mrs. N. A. Morrison made a gift of the nine hundred dollars to her son C. C. Morrison and that to this extent she intended to prefer him over her other children. But it does not follow from this that she intended that C. C. Morrison should also receive a distributive share of the remainder of her estate. She left no will so declaring, nor is there other evidence of such effect. The nine hundred dollars was more than appellee C. C. Morrison's proper portion of his mother's entire estate. To this extent he was preferred. Beyond this we do not think he should be permitted to claim, in the absence of more convincing proof, that his deceased parent so intended. The gift is not inconsistent with the presumption indulged, and the several letters of the deceased referring to her son I. W. Morrison in unkind terms, upon which appellees rely, were in answer to letters written by appellee C. C. Morrison, which were not produced, and in our judgment fall far short of showing a settled purpose on the part of the deceased mother to deprive her son I. W. Morrison of any part of her estate to which he might under the law be entitled, and as to her other children the record discloses not even a temporary absence of a mother's tender regard.

We conclude that the court erred in its finding and judgment to the effect that appellee, without return of the nine hundred dollars received by him, was entitled to participate in a distribution of the remainder of the estate. The judgment will therefore be reversed and here rendered for appellant against appellee C. C. Morrison for the one-seventh of the $2,000 of his mother's estate retained by him, namely, the sum of two hundred and eighty-five and five-sevenths dollars ($285 5-7), with in-

terest thereon from Mrs. Morrison's death, July 29, 1905, at the legal rate, together with all costs of this court and of the court below, it being further adjudged that the said sum of $81.33 in the hands of the clerk of the trial court be paid to appellants and which, together with the principal sum herein adjudged against appellee C. C. Morrison, shall be partitioned among appellants in their proper proportion.

Reversed and rendered.

Writ of error refused.

S. B. HARWELL ET AL. v. MRS. R. A. HARBISON.

Decided June 2, 1906.

1.—Surety—Fund to Secure—Rights of Creditor.

A debtor gave to a surety upon his note a deed of trust upon four sections of land to indemnify such surety against loss; thereafter the debtor contracted to sell the mortgaged land and gave a bond for title with the surety upon the note as surety upon said bond, and said surety transferred to the holder of the note the indemnity mortgage held by him. Held, that the deed of trust constituted a fund to secure the debt itself and inured to the benefit of the holder of the note independently of the transfer executed by the surety, and hence the holder of the note was not estopped by the action of the surety in signing the bond for title to the purchaser.

2.—Mortgage of School Land Before Completion of Title.

A mortgage upon school land executed by a purchaser of the same before he had completed the three years' occupancy required by law, is valid and enforceable, and this even against a vendee of such purchaser after said vendee had completed and made proof of the requisite occupancy.

Appeal from the District Court of Hardeman County. Tried below before Hon. S. P. Huff.

Wallace & Lumpkin, for appellants.—Where a surety on a bond of a grantor, given to secure the performance of a contract to sell and convey land free of all claims and liens of all persons, holds a deed of trust lien upon the land, he will be estopped by his relations to said contract and bond for conveyance from enforcing the deed of trust lien upon said land. Fielding v. DuBose, 63 Texas, 631; McHenry v. Knickerbocker, 27 N. E. Rep., 430; Webb v. Austin, 58 S. W. Rep., 808; 16 Cyc., p. 719, sec. 4.

The original purchaser of public school land from the State before he has resided upon the same for a period of three years and made the necessary three years' proof of occupancy had not the power to pass title to such property or interest by his own acts, except to one who is an actual settler, and is not disqualified from purchasing the land from the State, and has only an uncertain, undeveloped, indefinite and conditional equity in the land which is not subject to sale under execution. Sayles' Revised Civil Statutes, art. 4218ff; Williams v. Finley, 14 Texas Ct. Rep., 762; Hendricks v. Snediker, 30 Texas, 308; Moser v. Tucker, 87 Texas, 94; Edwards v. Norton, 55 Texas, 405; Roberson v. Sterrett, 96 Texas, 180; Chase v. York Co. Bank, 89 Texas, 321; Boone v. First Nat. Bank of Waxahachie, 43 S. W. Rep., 594; Sayles' Civil Practice, vol. 2, sec. 1247.

Fires & Decker, for appellee.

STEPHENS, ASSOCIATE JUSTICE.—This appeal is from a judgment foreclosing a mortgage, or deed of trust, on four sections of school land in Moore County, purchased originally by S. B. Harwell, who transferred the same to C. G. Miller before he had completed the three years occupancy. Miller was substituted in the land office as purchaser and completed and made proof of the three years' occupancy. The deed of trust was made by Harwell while the land stood in his name, and Miller purchased from him in ignorance of it, although it had been duly recorded. The note which it was given to secure was dated January 1, 1901, and was payable January 1, 1902, to the order of appellee, and was signed by S. B. Harwell as principal and Gus Gober and another as sureties. The date of the deed of trust was July 4, 1903, and the date of the contract for the sale to Miller was September 5, 1903. By the terms of the former the lands were conveyed to A. Neild in trust for the purpose of securing Gus Gober in the payment of the note above described, and it was made the duty of the trustee, at the request of Gus Gober "or other legal owner or holder of said note at any time made after the maturity" thereof, to foreclose the lien by a sale of the property as therein provided. In connection with the transfer to Miller a bond was executed in which Gus Gober, with others, was surety, which obligated Harwell to convey the lands in controversy to Miller free of all claims except that of the State for the original purchase money. After executing this bond Gober made a formal transfer of the lien to the holder of the note.

We are of opinion that the deed of trust was something more than a mere personal indemnity to Gus Gober; that it created a fund to secure the debt itself and that it therefore inured to the benefit of the holder of the note, who consequently did not need the formal transfer subsequently made by Gober. (MaGill v. Brown, 50 S. W. Rep., 143.) This seems to be a sufficient answer to the contention so much urged in behalf of Miller, that appellee was estopped by the conduct of Gober from enforcing the lien.

But the all-important and more difficult question yet remains, Did the mortgage, or deed of trust, executed by Harwell before he had completed the three years occupancy create a lien on the land, enforceable against Miller, the succeeding purchaser, after he had completed and made proof of the requisite occupancy, which he had done when suit was brought to foreclose the mortgage?

When the case of Haynie Mercantile Co. v. Miller, 14 Texas Ct. Rep., 500, involving the same lands, was before us, we were inclined to hold that Harwell had such interest as would be subject to execution, but did not find it necessary to do so. Since then a contrary view seems to have been expressed by the Supreme Court in Williams v. Finley, 14 Texas Ct. Rep., 762, in which it was held that a lien reserved to the vendor in the conveyance of a tract of land of which a large part afterwards proved to be vacant public domain could not be enforced against such portion of said land in the hands of the vendee after he had purchased it from the State as school land but before he had occupied it three years. The view expressed was, that to permit this would be "inconsistent with the

statutes regulating the sales of school lands and the rights of the State thereunder." That view was thus illustrated: "By selling out the settler's title at judicial sale and putting the purchaser thereat in possession it would destroy the occupancy of the settler—the condition on the maintenance of which the title depends—and could not at the same time require the purchaser at the judicial sale to perform it. If it be said that only by performance could he obtain the benefit of the purchase from the State, the answer is two-fold: (1) There is no provision for the substitution of such a purchaser for the original one, and (2) performance would at best be optional with him and the rights intended to be secured by the law to the State would be dependent on his will. Many persons who might buy at such sales would be wholly disqualified under the law to hold these lands as purchasers. It is true that the law allows purchasers of school lands to sell them, even before the three years occupancy has been completed, but it makes careful provision to secure the continued occupancy and the performance of other conditions." It was, however, held in that case that the contracts creating, or attempting to create, a vendor's lien on land of which a large portion afterwards proved to be vacant public domain were not for that reason invalid, since they "were not intended and had in themselves no tendency to injure the rights or interfere with the policy of the State." Only the enforcement of these contracts against the land, in the hands of one who had purchased it from the State, while it remained subject to the condition of occupancy, was denied. Observing this distinction and applying it to the facts of this case, we have finally concluded that the question above propounded should be answered in the affirmative. No reason is perceived why a purchaser of school lands should not be permitted to mortgage the same before as well as after he has completed his three years occupancy. No policy, or interest, or statute of the State would thereby be interfered with or violated. On the contrary, to deny the purchaser the exercise of this right, so far from promoting the interest and policy of the State, might result in depriving such purchaser of the only available means of complying with his obligation to the State. If the mortgagee is willing to wait till the requisite occupancy has been completed before foreclosing his mortgage and to take chances on the purchaser's complying with that condition of the sale, it seems to us that no one else ought to complain—not even the assignee of such purchaser, who merely steps into his shoes, and therefore acquires no rights superior to his. The principle finds illustration in a class of cases in this State sustaining the validity of the bond of a married man to convey the homestead. (Krebs v. Popp, No. 5090, decided by this court on February 3, 1906, and cases there cited. See, also, Johnson v. Townsend, 77 Texas, 640; Logue v. Atkeson, 80 S. W. Rep., 137, and Martin v. Bryson, 71 S. W. Rep., 615.

It is claimed that the deed of trust executed by Harwell, to the extent of the two hundred acres occupied by him as a home, was void *ab initio*, per force of the Constitution; but the record fails to show that he was a married man when this deed of trust was executed, and therefore the assignment raising this question is overruled. Judgment affirmed.

Affirmed.

Writ of error refused.

TEXAS & PACIFIC RAILWAY COMPANY v. J. F. WHITELEY.

Decided June 2, 1906.

1.—Alighting from Train—Contributory—Negligence—Charge.

The defendant having plead contributory negligence on the part of plaintiff in alighting from a moving train it was probably error for the court to charge that the suggestion of defendant's employes, if any, for plaintiff to alight did not alone justify him in alighting, but was a circumstance to be considered with all the other evidence to determine whether he exercised proper care; but such error, if any, was cured by an instruction in the latter part of the charge wherein the jury are told that they would determine the question of plaintiff's contributory negligence upon the whole evidence.

2.—Same.

Alighting from a moving train is not necessarily negligence per se.

3.—Issues—Preponderance of Evidence—Charge.

In a civil suit it is proper to instruct the jury to decide the issues submitted to them by a preponderance of the evidence.

4.—Train Porter—Scope of Duty.

It appearing from the testimony of the conductor that at certain stations, such as the one in question, it was the duty of the train porter to help the passengers to alight, a direction by the porter to the plaintiff to alight at the time he did so, was within the scope of his duty.

Appeal from the District Court of Taylor County. Tried below before Hon. J. H. Calhoun.

Wagstaff & Davidson, for appellant.—The charge complained of is error for the reason that it is a charge on the weight of the evidence in that it assumes that the suggestion of defendant's employes, if any there was, to alight from the train would have tended to justify plaintiff in so doing. Fordyce v. Allen, 26 S. W. Rep., 437, 438; Watkins v. Cates, 59 S. W. Rep., 1123.

The court erred in charging the jury as to the burden of proof as follows: "You will decide all issues submitted to you in this charge by a preponderance of the evidence." 16 Cyc., p. 928; Briggs v. Pierson, 26 S. W. Rep., 468.

T. S. Whiteley and *J. F. Cunningham,* for appellee.

SPEER, ASSOCIATE JUSTICE.—This is a personal injury suit in which appellee recovered judgment against appellant for the sum of one thousand dollars.

The following paragraph of the court's charge is complained of as being on the weight of the evidence: "If the jury believe from the evidence that the plaintiff J. P. Whiteley attempted to get off the train at Elmdale station while the train was moving, with or without a suggestion from defendant's employes for passengers to then alight at Elmdale station, the jury will determine from all the evidence as to the circumstances and conditions existing at the time, whether so alighting was an act which an ordinarily cautious and prudent person would or would not usually attempt under such or similar circumstances; the suggestion of defendant's employes, if any, for him to alight not alone justified him in alighting, but being a circumstance to be considered with

all the other evidence to determine whether he was in the exercise of such care as above stated in attempting to alight from the train when he did. If upon the whole evidence you find that plaintiff J. F. Whiteley in attempting to alight from the train when and in the manner that he attempted to alight did not observe that degree of care which an ordinarily prudent and cautious person usually exercises under the same or similar circumstances to those then existing, and that such want of care either in the particulars alleged by the defendant or in any other particulars, as plaintiff pleads that the injuries occurred without negligence on his part, and that such want of care was the proximate cause or contributed directly to the injury, if any, that he received. you will return a verdict for the defendant." The particular part of the charge objected to is that which instructed the jury that the suggestion from appellant's employes for appellee to alight, if any was made, was a circumstance to be considered with all other evidence in determining whether or not he was in the exercise of proper care in alighting. On the whole the charge was probably on the weight of evidence in saying that the fact of such suggestion alone would not justify appellee in his course, when as a matter of fact the jury might have concluded that it would. The rule was properly stated in the latter half of the charge quoted that "upon the whole evidence" the jury would determine the question of appellee's contributory negligence. We find nothing in the charge of which appellant can justly complain.

We also rule against appellant upon its contention that the act of appellee in alighting from the train under the circumstance shown, if he did so without a suggestion from its employes, constituted contributory negligence *per se* under the circumstances of this case, and that the charge above quoted was erroneous for this further reason.

The court further instructed the jury to decide all issues submitted to them by a preponderance of the evidence, and this is objected to because "indefinite and uncertain and the charge should have required the plaintiff to establish the material allegations in his petition by a preponderance of the evidence." But this criticism we think is entirely wanting in merit, since the issues submitted embraced the material allegations in appellee's petition, and if they further included the issue of contributory negligence made by appellant's answer, such inclusion was not only justifiable, but proper.

We can not hold that the verdict and judgment in appellee's favor are not supported in the law under the evidence. It is true, he stepped off a moving train in the night time while the ground was covered with snow and ice and was injured in consequence. But it has never been held, so far as we are aware, that the act of stepping on or off a slowly moving car is contributory negligence as matter of law. The act must be viewed in the light of all the surrounding circumstances and tested by the conduct of a reasonably prudent person under such circumstances. The speed of the car, the character of the ground upon which the passenger is to alight, his opportunity or lack of opportunity for seeing where he is to alight, the instructions of the carrier's employes to the passenger, are elements which properly enter into the consideration in passing upon the issue of one's contributory negligence in alighting from a moving train.

It is suggested that the train porter who directed appellee to get off the train at the time he did, had no authority to assist passengers in getting on or off trains, and was therefore not acting within the scope of his duty at the time he gave such directions. But appellant's conductor testified that at a place like Elmdale, where there is no agent, the train porter does get out and help passengers off. This evidence, we think, is sufficient to support the verdict and judgment upon this issue.

We find no error in the judgment, and it is affirmed.

Affirmed.

Writ of error refused.

W. N. GRAY v. MARY E. GRAY.

Decided June 2, 1906.

Divorce—Voluntary Separation.

A divorce was properly refused the husband on the ground of abandonment upon evidence showing that the wife accused him of squandering upon lewd women all that she and her children could make (which the husband denied) and declared that she would see him dead and in hell before she would live with him another year; that thereupon the husband and wife by mutual consent divided the land constituting the homestead, the wife remaining in the dwelling and the husband moving into a tenant house upon the same place. Such separation having continued for more than three years, it appearing therefrom that the husband himself performed the physical act of leaving his wife and remaining away for the statutory period.

Appeal from the District Court of Comanche County. Tried below before Hon. N. R. Lindsley.

E. C. Gaines, for appellant.

CONNER, CHIEF JUSTICE.—This is an appeal from a judgment denying a divorce sought by appellant from his wife. The ground alleged is predicated upon the second clause of Revised Statutes, article 2976, namely, that she had "voluntarily left his bed and board for the space of three years with the intention of abandonment." Appellee made no defense and the sole question presented to us is whether the evidence sustains the court's judgment.

The suit was filed September 6, 1905, and it is undisputed that they separated about the 1st of December, 1901, since which time they have been living apart. At the time of the separation they were living upon a farm consisting of one hundred and sixty acres, which was by agreement divided between them, appellee retaining the west eighty acres upon which was located the homestead of the parties, appellant receiving the eastern portion upon which was located a rent house and into which appellant moved after the separation. The separation was upon a written agreement to that effect, and the property was divided by arbitrators agreed upon by the parties. We quote the following from appellant's testimony as it appears in the transcript: "Q. Prior to the arbitration and since the separation, had you lived in a separate house from hers and have you so lived since that time? A. Yes, sir. After the first of

January I have been living on that place where I am now living with the exception of one year that I went to the Territory, that was the year 1903. Q. Since you came back have you lived there at that place? A. Yes. Q. Prior to the time you separated from your wife, did your wife make any statement as to whether she intended to live with you any longer? A. Yes sir, she said that she would see me dead and in hell before she would live with me another year. Q. What year was that now? A. In 1901. Q. Had you ever mentioned separating from her? A. No sir. Q. What reason did she give for not living with you any longer? A. She said that I was taking all that she and the children made and giving it to lewd women. She said that I was chasing around after lewd women and giving them all that she and the children made. Q. Were you doing that at all? A. No sir, I wasn't. Q. That was the reason she refused to live with you longer? A. Yes. Q. Did you establish yourself in a separate house from hers? A. Yes sir, there is a house on the place that I had built for a rent house and I moved in that. The men that divided the land said for me to have that till the first of January. Q. Did you go in that house? A. Yes sir. Q. Did you up to that time want to separate from her? A. No sir. Q. Did you leave her willingly? A. Yes sir, after she said she would see me dead and in hell before she would live with me and said that she could get along better without me, I told her that I wanted her to do the best she could for herself, and so I left. Q. Would you at that time and would you now, if she would agree to live with you, and convince you that she was willing to live with you, would you be willing to live with her? A. I reckon I would but she has never made me that proposition. Q. If she was to come to you in a proper way, would you live with her? A. Yes sir, but she has stated that she wouldn't live with me any more. . . . Court asks the witness: Q. Did you have a written agreement that you wouldn't live together any more? A. Yes sir. Q. Did you consult a lawyer about that? A. Yes sir. Q. Did he write up the written instrument? A. Yes sir. Q. What was that instrument? A. I don't know that I could tell you. Q. Was it an agreement that you and your wife should live separate? A. Yes sir. Q. Each of you signed it? A. Yes sir. Q. Agreeing to live separate? A. Yes sir. Q. You all agreed to arbitrate the property? A. Yes Sir. Q. And you deeded your land to some one and he then deeded you your part and your wife her part? A. Yes sir. Q. When you agreed to separate you had been living together on this 160 acres of land, and you left her there and she is still living at the same place? A. Yes sir. Q. You have been living on the other half of it, with the exception of the year that you were in the territory? A. Yes sir. Q. When you made that agreement with her you never did aim to live with her again? A. No sir. Q. And the reason you left is because she said what she did? A. Yes sir, she said that she would see me dead and in hell before she would live with me another year, and said that she could get along better without me than she could with me, and I told her that I wanted her to do the best she could for herself."

It thus conclusively appears that appellant, pursuant to the terms of a written agreement, himself performed the physical act of leaving his wife and remaining away from her for the statutory period. It is not

pretended that a voluntary separation thus brought about, however, long continued, affords under our law a legal ground of complaint, nor do we know of any case in which our courts have decreed a divorce under such circumstances. It is insisted, however, that appellee's language or conduct induced the agreement—justified appellant's abandonment—and that hence the wife is to be placed in the category of those specified in the statute quoted. We have searched the record carefully and we fail to find any evidence of cruelty or misconduct on the part of appellee, except that on one occasion she made the statement imputed to her in appellant's testimony. Appellant failed to state while a witness, and there is no other witness to the remark, just when or under what circumstances this declaration was made, and while appellant denied the wife's accusation against him, the court heard all of appellant's testimony, had an opportunity to observe his manner, and we feel unwilling to say that the remark of the wife constituted such an excess or cruelty as would relieve appellant from the effect of a separation voluntarily begun by him and since maintained without any effort exhibited in the record to bring about a reconciliation. The marital relation is justly regarded as one of the most sacred relations of life, and our statute expressly provides that "in all suits and proceedings for divorce from the bonds of matrimony, the defendant should not be compelled to answer upon oath, nor shall the petition be taken as confessed for want of an answer, but the decree of the court shall be rendered upon full and satisfactory evidence, upon the verdict of a jury, if a jury shall have been demanded by either party, and if not, upon the judgment of the court affirming material facts alleged in the petition." (Rev. Stats., art. 2979.)

We approve the findings of the court below and affirm the judgment.

Affirmed.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS v. W. J. DUNNAWAY.

Decided June 2, 1906.

1.—Right of Way Gates—Duty to Repair—Trivial Defect.

In a suit for the value of animals killed by defendant's train the evidence showed that the animals escaped from plaintiff's enclosure through a gate at a private crossing onto defendant's right of way; that the gate had become defective, and that it would have cost from twenty-five cents to two dollars to have repaired the same. Held, that whether or not the defect was so trivial as to have made it the duty of the plaintiff to repair the same was a question of fact for the jury, and the court did not err in refusing a peremptory instruction for the defendant.

2.—Same—Contributory Negligence.

Plaintiff's stock were allowed to run in an enclosure separated from a cotton field by a fence consisting of only one strand of wire; from the enclosure they escaped into the cotton field and thence through a defective gate onto the right of way. Held, plaintiff was not guilty of contributory negligence.

Appeal from the County Court of Ellis County. Tried below before Hon. F. L. Hawkins.

Groce & Eskridge, for appellant.—From the evidence it indisputably appeared that the defects in the gate through which appellee's mules probably entered upon appellant's track were trivial in their nature, and such as could have been repaired practically without labor or expense, and were regarded by appellee as not of sufficient importance for him to call appellant's attention to them, and such defects should have been remedied by appellee, or he should have requested appellant to remedy them, and under the facts the trial court erred in submitting to the jury the question whether such defects were trivial or substantial, and in refusing the peremptory instruction requested on behalf of appellant, and further erred in refusing appellant a new trial, because the evidence was insufficient to sustain the verdict and judgment for appellee. Missouri, K. & T. Ry. Co. of Texas v. Bradshaw, 83 S. W. Rep., 897; St. Louis S. W. Ry. Co. v. Adams, 24 Texas Civ. App., 236; Texas & P. Ry. Co. v. Glenn, 8 Texas Civ. App., 303.

Skinner & Supple, for appellee.

RAINEY, Chief Justice.—This is an appeal from a judgment in favor of W. J. Dunnaway, wherein he recovered from the Missouri, Kansas & Texas Railway Company of Texas damages for the killing of two mules and injuring several others by one of the railway company's trains. It was alleged that defendant's track ran through plaintiff's farm, its right of way fenced with a private crossing enclosed by gates, which the railway company negligently permitted to get out of repair and through which said mules gained access to the right of way where they were killed and injured as aforesaid. Defendant answered by exceptions, a general denial, and specially that the defect could have been remedied practically without labor or expense and that plaintiff was negligent in not repairing or requesting defendant to repair such defect, and in permitting the stock to escape into the enclosure, from which they could enter upon the right of way.

The court by its charge submitted to the jury, for its determination, the question, whether or not the defect is the gate was of such a trivial character as that the plaintiff could have repaired it practically without labor or expense. The appellant asked a peremptory instruction in its favor and contends that the evidence shows the labor and expense necessary to repair such gate was so trivial that plaintiff should not recover. This peremptory instruction was refused and error is assigned thereto.

There is practically no conflict in the evidence on the main issues. It shows that the gate posts had been drawn farther apart, some eight inches, by the wire fence so that the chain attached to the gate would not reach the spike on the post, placed there for fastening the gate. This left the gate insecure and it stood open, and there was no obstruction to prevent stock going on the right of way.

Plaintiff testified in effect that the chain could have been extended by attaching a few more links thereto, which would have cost about $1.25. He further stated that he would have taken the contract for twenty-five cents. When questioned about the cost of placing another post in between the gate and original post to prevent the gate from swinging too far, he stated that it would be from one to one and one-half

dollars. One Calvert, witness for plaintiff, testified as to putting the post in, that it would cost from one to two dollars. No other witness testified as to the cost of repairing the post. After the injury to the mules the gate was repaired, presumably by the railway company, by a post being put in between the gate and original post, but what it cost is not shown.

In St. Louis S. W. Ry. Co. v. Adams, 24 Texas Civ. App., 236, this court held, under the circumstances of that case, that when the defect in a gate could be repaired practically without labor or expense the party could not recover, but in that case there was no testimony as to what it would cost to repair. The law requires the railroad to keep its fences in repair and whether or not the testimony in this case shows that the repair could have been made practically without labor or expense, was a question for the jury, and the court did not err in not giving appellant's peremptory instruction. If the defect could have been remedied by the expenditure of twenty-five cents by lengthening the chain, it seems it would have been practically inexpensive. But was that the proper way to repair it? It seems in repairing it the railway company did not think so, as it put in another post, which was evidently at greater cost than twenty-five cents, but at such cost that we can not undertake to say it was practically without labor or expense. The law does not contemplate that the land owner shall be at any labor or expense to keep the railroad fences that run through his farm in repair. What would be practically no labor or expense in one case might be so in another case and it is a question for the jury.

The plaintiff had his stubble land separated from his cotton land by one strand of wire, and his mules were being pastured on the stubble. From this enclosure they escaped into the cotton land enclosure and from there they went through the open gate onto the right of way. Defendant contends that in this plaintiff was guilty of contributory negligence and it asked a special charge covering this feature of the case, which charge was refused. We do not think there was error in refusing this charge. In the case of Houston, E. & W. T. Ry. Co. v. Adams, 63 Texas, 200, a case analogous to this in principle, where the railway company failed to keep its cattle guards in repair, it could not shield itself from damages to crops from cattle getting in by the failure of the land owner to repair the cattle guards. See also Kendall v. Railway Co., decided by this court May 26, 1906. Plaintiff had the right to allow his stock to run on his premises, and the mules escaping from his enclosure, under the circumstances, did not relieve the railway company from liability, and there was no error in refusing the charge requested.

The judgment is affirmed.

Affirmed.

H. SHURTER v. M. BUTLER.

Decided June 6, 1906.

1.—Breach of Contract—Proximate Damages.

B. sued S. for the price of brick furnished to construct a sewer. S. admitted the debt, but plead in reconvention for damages occasioned by delay on the part of B. in furnishing the brick as they were needed for the work, and as B. had contracted to do; the damages claimed were $10 per day liquidated damages paid to the city for delay in completing the sewer; expenses of a watchman during the delay; expenses of extra labor; and expenses of reexcavation occasioned by the delay. B. knew that S. was under contract to complete the work within a certain time, and that this could not be done unless the brick were furnished promptly as needed. When the first delay in furnishing brick occurred, S. threatened to buy brick elsewhere, but was dissuaded by B.'s agent, who promised that the brick should be promptly furnished. Held, it could not be said as matter of law that said damages were too remote, and the court erred in excluding evidence of the same.

2.—Same—Repudiation.

To justify a party to a contract in repudiating the same he must not be in default himself, and the breach of the other party must be without excuse. A party can not stand on and repudiate a contract at the same time.

Appeal from the District Court of Harris County. Tried below before Hon. W. P. Hamblen.

Brockman & Kahn and *J. V. Meek,* for appellant.—"The court erred in holding, as a matter of law, that this defendant could not recover from the plaintiff under the pleadings and contract for the several items of damage alleged in the defendant's cross bill, save and except the difference in the price of the brick bought from Milby and Daw, and the contract price that the plaintiff was to have furnished said brick for; and in also holding, as a matter of law, that on the contract declared on that the defendant could only have recovered, under the court's view of the law, the difference in the value of the brick contracted to be delivered, if they had been delivered, and the value of said brick as they were so delivered, if the brick were not as valuable as those contracted for." Watkins v. Junker, 90 Texas, 584; same case, 38 S. W. Rep., 1129.

Fisher, Sears & Sherwood, for appellee.—Appellant having alleged that he was to pay appellee for the latter's bricks as, or when, appellant received his money from the city, then if appellant did receive such money and failed to pay appellee, he could not recover against appellee on his cross bill. Kelly v. Webb, 27 Texas, 369; Johnston v. McDonnell, 37 Texas, 603; Page v. Payne, 41 Texas, 146; Davis v. Yates, 1 Texas Ct. Ap. (W. & W.), sec. 265; Miller v. Sullivan, 14 Texas Civ. App., 130; Felton v. Tally, 72 S. W. Rep., 614; 7 Am. and Eng. Ency. of Law, 114 and 121.

REESE, ASSOCIATE JUSTICE.—M. Butler sued H. Shurter to recover $2,400.10 alleged to be due him by Shurter for bricks sold and delivered. Defendant Shurter answering admitted that he owed the amount stated,

but pleaded in offset and reconvention damages growing out of a breach of the contract whereby Butler had agreed to sell and deliver the bricks within a limited time, which it was alleged he had failed to do.

Upon trial before a jury Butler had a verdict for the amount claimed by him to be due, less $280, being a part of the damages claimed by defendant in his plea in reconvention. From this judgment defendant Shurter appeals.

Appellant had made a contract with the city of Houston to build certain sewers, which contract required him to complete the work in 120 days, or in default to pay $10 per day liquidated damages after the expiration of that time until the work was completed. Appellee's agent, with whom appellant contracted to furnish the brick for the work, knew the terms of the contract. For the work about one million bricks were required, and by the terms of the contract between appellant and appellee's agent they were to be furnished at such time and in such quantities as they were called for, and to be paid for as appellant received his money from the city, which was to be paid to him as the work progressed upon estimates of the work done, less twenty percent which was to be held back by the city until its completion. Instead of completing the work in 120 days it was not done for nearly a year, the delay being caused, as alleged, by the failure or refusal of appellee to furnish brick as required for the work and as demanded by appellant. There was evidence tending to show that this delay began the first month of the contract, and that appellant proposed or threatened then to get brick elsewhere, but was dissuaded by appellee's agent.

Certain damages were claimed by appellant in his plea in reconvention as proximately caused by appellee's failure to furnish brick as agreed, thus delaying the completion of the work; such as the $10 per day paid to the city under the contract for the delay in completing the sewer; the expense of a watchman required to watch the excavation made for the sewer, for the time the completion of the work was delayed; a large sum expended for extra labor rendered necessary by the delay; and the amount expended for re-excavation occasioned thereby; as well as the difference between the amount paid by him for about 300,000 brick, which appellant was compelled to buy elsewhere upon appellee's refusal to furnish the same, and the contract price thereof.

The errors assigned are to the ruling of the court in refusing to permit appellant to prove any of the items of damages claimed except the difference in the price of the brick, such damages being considered by the court too remote, as appears by bill of exceptions number 5 in the record.

We think the court erred in sustaining objections to the testimony offered as to these items of damage. It can not be said that, as matter of law, they were too remote to be recovered. Appellee knew that the work had to be completed in 120 days and that the completion of the work depended upon his furnishing the brick promptly as needed in the prosecution of the work. There is evidence tending to show that appellant proposed to purchase the brick elsewhere when appellee's failure to furnish them as required began to delay the work, and that he was dissuaded from doing so by appellee's agent who promised that brick should be promptly furnished. If there was a breach of the contract by appellee he was liable to appellant for such damages as were the proxi-

mate result of the breach; that is, for all such damages as resulted directly from such breach and which might be reasonably supposed to have been in contemplation of the parties, at the time of making the contract, as likely to result therefrom. (Gulf, C. & S. F. Ry. Co. v. Loonie, 84 Texas, 259; Gulf, C. & S. F. Ry. Co. v. Hume Bros., 87 Texas, 220; Westfall v. Perry, 23 S. W. Rep., 741; Watkins v. Junker, 38 S. W. Rep., 1131; 8 Am. & Eng. Ency. of Law, 637-8.) The expenses incurred by appellant must have been reasonable and necessary, and appellant must have been justified in incurring them by the circumstances.

The only answer made by appellee in his brief to the various assignments of error is that, even if the court erred in the matters complained of, such errors are harmless for the reason that appellant alleged that he was to pay appellee when appellant received his money from the city, and the proof was that he did receive such money, but failed to make the payment. The evidence showed that appellant had received pay for the work and had not paid appellee in full for the brick. There is further a suggestion, not very clear from the evidence, that he did not pay appellee for the installments of brick furnished as he received his installments of pay from the city, but it also appears that appellee continued to furnish brick, though not as fast as they were required, after the alleged default in payment by appellant, thus holding on to the contract instead of repudiating it. The agreement of appellee to furnish the brick and of appellant to pay for them were dependent contracts, and the failure of appellant to pay, as agreed, if without excuse, authorized appellee to repudiate the contract to deliver, but in order to justify him in doing so, he must not have been himself in default or guilty of a breach on his part, and the failure of appellant to pay must have been without excuse. (2 Parson's Contracts (bottom), pages 833-835.)

If by appellee's breach, appellant being at the time without fault, appellant had suffered damage for which appellee would be liable, appellee could not thereafter, without making good such damages, elect to repudiate the contract because appellant withheld pay which would have been due appellee if he had carried out the contract, and held the money to recoup himself for the damages sustained. Appellant sought to show why he had not paid appellee according to the terms of the contract, but was not allowed to do so. This was error. Appellee's brief does not furnish a sufficient answer to the various assignments of error.

For the errors indicated the judgment of the trial court is reversed and the cause remanded.

Reversed and remanded.

FRANKLIN COUNTY v. J. A. HUFF.

Decided June 6, 1906.

Obstructing Public Road—Injunction.

The fact that the road overseer had authority to remove obstructions from a public road unlawfully fenced up by defendant did not prevent the county from maintaining its action against him for an injunction against the continuing of such nuisance, and the county had the right to institute and prosecute such action.

Appeal from the District Court of Franklin County. Tried below before Hon. P. A. Turner.

C. W. Stringer, for appellant.—It is not enough that there is a remedy at law; it must be as plain and adequate, or in other words, as practical and efficient to the ends of justice and its prompt administration, as the remedy in equity. Sumner v. Crawford, 91 Texas, 132; Smith v. Carroll, 66 S. W. Rep., 864.

The county is a proper party to maintain a suit in equity in the District Court to enjoin or abate a public nuisance or purpresture caused by the obstruction of a public road, and such remedy is cumulative of any other to which it may be entitled. Llano v. Llano County, 5 Texas Civ. App., 137; Llano County v. Llano, 9 Texas Civ. App., 378; Travis Co. v. Trogden, 88 Texas, 302; Dunn v. Austin, 77 Texas, 139; Allen v. Parker Co., 23 Texas Civ. App., 540; State v. Patterson, 14 Texas Civ. App., 469; Belton v. Central Hotel Co., 33 S. W. Rep., 297; Clayton County v. Herwig, 100 Iowa, 631; Stearns County v. St. Cloud, etc., Ry. Co., 36 Minn., 425; Drews v. Geneva, 42 Law Rep. Ann., 814, and note; 21 Am. and Eng. Ency. Law (2d ed.), 703, 710; 20 Am. and Eng. Ency. Pl. and Pr., 936.

R. T. Wilkinson, for appellee.—The right of action to abate a public nuisance can be exercised only by the sovereign power by indictment or equitable proceedings brought by its proper officers, unless such power is expressly conferred on others. A county being only a political subdivision of the State, its duties are only administrative, and the powers conferred upon them are rather duties imposed than privileges granted, and there being no power expressly conferred by statute, none exists to institute suit to abate a public nuisance. Elliott on Roads and Streets, secs. 654, 655, 664; Grossman v. Oakland, 36 Law Rep. Ann., 593; State v. Patterson, 14 Texas Civ. App., 465; City of Sherman v. Shobe, 94 Texas, 126; Heigel v. Wichita County, 84 Texas, 392.

FISHER, CHIEF JUSTICE.—Huff by fences obstructed a public road legally opened and established, whereupon the county brought this suit to abate same as a public nuisance, and to restrain Huff from maintaining such obstruction. The case below was tried before the court and judgment was rendered against the county.

We have considered the cross assignments of error contained in appellee's brief, and find that none are well taken. The pleadings of the plaintiff are sufficient and so is the evidence to support the finding of the trial court. The appellee's objections to evidence are overruled.

The finding of fact of the trial court is as follows:

"1. I find that at the February term of the Commissioners' Court of Franklin County, 1904, the defendant presented to said court a petition signed by 19 citizens of said county asking said court to change a portion of the public road leading from the town of Mt. Vernon, Texas, to the town of Pittsburg, in Camp County, Texas; that the portion of said road asked to be changed or altered was about 660 yards long and that that portion of the said road was to be discontinued and a new

road to be opened up so as to connect ends of the old road so discontinued.

"2. I find that said petition represented and that the defendant represented to said court that the route for the new road was on as good and practicable ground for a road as was the old road and that the new road or new part of the road would not be any longer than that part of the old road discontinued and would be on as good ground.

"3. I find that the new road was in fact on much worse ground for a road than that of the old road; that the ground on which the new road was placed was and is impracticable for a road.

"4. I find that the change in the road makes the road about 160 yards longer than it was before the change, that is, the new part of the road is about 160 yards longer than that part of the old road discontinued.

"5. The court ordered that part of the old road affected by the change discontinued when the new road was established and cut out according to law and I find that the defendant fenced up and stopped the public from using the old road before the new road was cut out and put in a condition to be used by the public.

"6. I find that the change in the road was agreed to be made solely for the benefit of the defendant and that he agreed with the Commissioners' Court to lay out, cut out and establish the new road on as good ground as the old road was on and put the same in as good condition as the old road was before he fenced up the old road, and I find that the old road was on good ground and that the new road was on bad ground. I also find that the old road was in good condition and that the new road was and is in bad condition and not cut out as the law requires for a second class road.

"7. I find that at the August term of the Commissioners' Court of Franklin County there was presented to said court a petition of thirty or thirty-two of the citizens of said county protesting against the proposed change in said road, and that, acting on said petition, the court rescinded its former order made at the February term of the court and ordered the old road to be opened up to the public.

"8. I find that defendant had placed his fence across the old road and excluded the public from its use and that when notified by the overseer of said road to open up said old road and to remove his fence, he refused to do so claiming that he had an order of the Commissioners' Court authorizing him to fence it up.

"9. I find that the order of the said court made at its February term, 1904, under which defendant claimed to have fenced said road was a conditional order and only authorized him to fence said road when and not till when he had opened up and established the new road according to law and that defendant had not opened up said new road according to law and that the said new road had never been opened up according to law.

"10. I find that there was never any notice of the proposed change in said old road posted up along or about the place or route of said proposed change or anywhere else and that the said court at its February term, 1904, acted on said petition asking for said change without any such notice. I further find that no jury of view was ever appointed to

view out said proposed new road, and I also find that the Commissioners' Court or any of its members never viewed or went over said route along which said new road was to be established.

"11. I find that no notice was served on the defendant notifying him that said court was going to act on said petition presented to it at its August term praying said court to rescind said order made by said court at its February term, but I find that defendant had actual knowledge that said petition had been presented to said court."

The conclusions of law are as follows:

"The Commissioners' Court has no power to alter, change or discontinue any part of a first or second class road of their county without first appointing a jury of view to view out the new road along such change or without first going over the route of the proposed change in person and viewing out the route of the new part of said road. The Commissioners' Court has no power or authority to alter or change the route of a first class or second class public road of their county, whereby the said road is placed on worse ground and the road is thereby made longer.

"The Commissioners' Court has no power or authority to change, alter or discontinue a first or second class public road of their county, on the petition of citizens freeholders of their county without written notices of such proposed change are posted up along the route of said change.

"For the want of all the above prerequisites I conclude that the order of the Commissioners' Court making the change in said road and altering the same and discontinuing a portion of said road was illegal and void and that the defendant had no right to fence or obstruct said old road or any part thereof by virtue thereof and that he has no right to maintain his fence across said road.

"2. I conclude that the plaintiff is entitled to the relief sought if the equity powers of this court can be invoked to grant the relief.

"3. I conclude that the plaintiff has an adequate remedy at law. That the overseer of said road should remove the obstructions from said old road and open it up to the public. That the equity powers of this court can not be invoked to grant the relief prayed for. I therefore refuse the injunction prayed for and find for the defendant.

"4. I conclude that, as the order of the Commissioners' Court made at its February term, 1904, was a conditional order and depended upon the defendants opening up the new road according to law the said court had jurisdiction of the matter and of the defendant, and that said court had the right and legal authority to make the order at its August term, 1904, rescinding said order made at its February term, 1904."

The findings of fact entitle the plaintiff to the relief asked. If the overseer of the road was seeking the relief of a court of equity to abate and restrain the nuisance, the existence of an adequate legal remedy in his favor would justify a denial of relief by the court. But here the action is by the county whose right of possession of property it holds for public use is unlawfully disturbed and interfered with; and the power of a court of equity in such a case to grant relief was by this court considered and admitted in the case of Llano v. Llano County, 5 Texas Civ. App., 137, although some other remedy might be open to the plaintiff. The principles decided in that case which we have followed in sub-

sequent decisions, if correct, are controlling in the disposition of this case. In the note to Drew v. Geneva, 42 Law Rep. Ann., 814, are cited many cases of similar import.

The judgment is reversed with instructions to the trial court to render a judgment in appellant's favor in accordance with this opinion, with such orders as may be necessary to abate the nuisance and to restrain its maintenance.

Reversed and remanded with instructions.

Application for writ of error dismissed for want of jurisdiction.

W. R. BLAIN ET AL. v. PARK BANK & TRUST COMPANY.

Decided June 6, 1906.

1.—Correction of Judgment.

There can be no question as to the power of a trial court in this State to correct its judgment as to an error in the calculation of the amount thereof at any time prior to action by the Appellate Court upon the judgment.

2.—Taxing Costs—Failure to Complain in Trial Court.

It not appearing that anything was done in the trial court by defendant to have certain costs taxed against the plaintiff, the matter will not be considered by the Appellate Court.

Error from the County Court of Jefferson. Tried below before Hon. D. P. Wheat.

Blain, Howth & Adams, for plaintiffs in error.—After an appeal or writ of error has been perfected the lower court loses jurisdiction over the suit, and the judgment must be corrected and excess remitted in this court. Rev. Stats., art. 1024; Pearce v. Tootle, 75 Texas, 150.

Jackson & Gordon, for defendant in error.—Where a mistake is made in taxing costs it will not be ground for reversal on appeal unless brought to the attention of the trial court by motion to retax costs or in some other manner. Bridges v. Samuelson, 73 Texas, 523; Allen v. Woodson, 60 Texas, 653-654; Castro v. Illies, 11 Texas, 39 and 40.

The trial court has the power upon notice to correct a mistake in the judgment entry in the amount after the close of the term and even after an appeal is perfected or a writ of error sued out. De Hymel v. Scottish American Mortgage Co., 80 Texas, 493; Hickey v. Behren, 75 Texas, 495; Mark v. Brown, 42 Texas, 111; De Camp v. Bates, 37 S. W. Rep., 644; Ramsey v. McCauley, 9 Texas, 106; Sayles' Civil Statutes, art. 1357.

The power to correct the records exists in the lower court, not by reason of its continued jurisdiction over the subject matter but by virtue of its continuing power over its records. Hickey v. Behrens, 75 Texas, 495; Blum v. Neilson, 59 Texas, 380; Grier v. Powell, 14 Texas, 321; Sayles' Rev. Stats., art. 1024.

JAMES, CHIEF JUSTICE.—The Park Bank & Trust Company sued and obtained judgment on a note against Blain as maker, and I. D. Polk and C. R. Reynolds as endorsers, the amount of the judgment which was rendered on March 1, 1905, being $59.51 in excess of the proper calculation of the note and interest. On July 20, 1905, an execution issued. On August 12, 1905, the defendants in the judgment filed their petition and supersedeas bond for writ of error, and citation was had thereon on August 16. After this, but before the transcript was taken out, the plaintiff in the judgment filed in the trial court a motion to reform the judgment in respect to said error. Notice was given of this motion on September 20, 1905, which was prior to the taking out of the transcript. On October 16, 1905, the motion was heard and the judgment corrected. The transcript was applied for on November 3, 1905, and includes the proceedings had on said motion.

Nevertheless the writ of error was prosecuted and the transcript brought here.

There can be no question under the settled decisions in this State as to the existence of the power of the trial court to correct its judgment as to an error in the calculation of the amount thereof, at any time prior to the action of the Appellate Court upon the judgment. (Ramsey v. McCauley, 9 Texas, 108; DeHymel v. Scottish American Mortgage Co., 80 Texas, 493; Marx v. Brown, 42 Texas, 111; Hickey v. Behrens, 75 Texas, 495.) Therefore the court committed no error in entertaining said motion.

It is also assigned that the court erred in its judgment on said motion in not taxing against plaintiff all the costs accruing after the date of the original judgment. The record does not disclose that anything was done in the trial court to have this matter remedied there. It is also a well settled rule in this State that a mistake of this kind with reference to adjudicating costs, will not be considered by the Appellate Court under such circumstances. (Valentine v. Sweatt, 34 Texas Civ. App., 139, and cases there cited.)

Plaintiffs in error rely upon the case of Pearce v. Tootle, 75 Texas, 148, in which case it appears that there was no order of the trial court correcting the judgment, but that plaintiffs in that case had simply filed a remittitur in the trial court. The opinion says: "The excess being evidently the result of an error in calculation, the judgment might have been amended upon motion in the court below." In the present case this was done, as the record before us shows.

The matter of the costs of the proceedings for correction of the judgment not being properly before us, there is no other error in the judgment of the District Court, as corrected, and it must be affirmed.

Defendant in error moves to affirm with damages, and we can assign no valid reason for denying the motion. (Marx v. Brown, 42 Texas, 111; Grier v. Powell, 14 Texas, 320.)

Affirmed with damages.

W. H. OLSCHEWSKE v. ROBERT SUMMERVILLE ET AL.

Decided June 6, 1906.

1.—Partition of Land—Laws 1905.

Where land is owned jointly and in equal parts by two different parties, but all the improvements thereon belong to one of such parties, and it has been determined by the Court in accordance with the provisions of the General Laws of 1905, that the land is not susceptible of a fair and equitable division, the trial court should order a sale of the property, with instructions that the report of the sale should show the value of the improvements and the value of the land separately, and the proceeds of the sale should then be divided in accordance with the interests of the parties in the property.

2.—Sale of Community Property by Survivor to Pay Community Debt.

Where land acquired jointly by husband and wife is owned by them in their respective separate rights, and is afterwards improved with community funds and a community debt incurred secured by lien on such improvements, the wife, after the death of the husband, has the right to convey her half interest in the land and all the improvements in satisfaction of said community debt, and such sale binds the children of the marriage as effectually as if they had made it themselves.

3.—Judgment of Reversal—Writ of Error—Practice.

When a case is reversed and remanded by a Court of Civil Appeals, and a party obtains a writ of error on the representation that the opinion of the Court of Civil Appeals settled the case, and the Supreme Court affirms the judgment of the Court of Civil Appeals, the case can not be opened again in the trial court for the purpose of hearing any testimony that might change the state of the case on the former appeal.

4.—Partition of Land—Improvements.

Where one joint owner owns all the improvements on land which is to be partitioned among several owners, the owner of the improvements should be allowed to remove them if he desires to do so, and thus simplify the partition.

ON REHEARING.

5.—Same—Taxes Paid by Tenant in Common—Minors—Rents.

Taxes paid by a tenant in common upon the joint property should be refunded to him pro rata on a partition of the land. But one tenant in common is not liable to his cotenants for rents until an act amounting to an ouster has occurred. Such rents not being a lien on the land, like taxes, a minor cotenant can not be held personally liable for them.

Appeal from the District Court of Harris County. Tried below before Hon. Norman G. Kittrell.

Baldwin & Christian, for appellant.—Inasmuch as this cause had been carried to the Supreme Court upon the statement of the appellants that the judgment of the Court of Civil Appeals in reversing and remanding said cause practically settled said cause, it was the duty of the Supreme Court to render such judgment as should have been rendered by the trial court, and inasmuch as the Supreme Court found that there was an absence of certain findings of fact of such nature as to prevent them from rendering the judgment that the trial court should have rendered, and they thereupon reversed and remanded said cause with instructions to the trial court to ascertain said facts and render judgment in accord-

ance with said opinion, and inasmuch as the appellants and the appellees filed agreement in the trial court agreeing as to the facts mentioned by the Supreme Court as being necessary to be found by the trial court, it was the duty of the trial court to render judgment upon the same in accordance with the opinion of the Supreme Court and without reopening the cause upon any question that had been finally disposed of by the opinion of said court; and inasmuch as the question of title to the property had been finally passed upon and settled by the Supreme Court, this question could not be reopened by the trial court, and the trial court erred in permitting the appellees to reopen this question and to introduce testimony showing that a part of the improvements upon said property had been paid for with the separate means of their father, Sidney B. Summerville. McConnell v. Wall, 67 Texas, 353; Wells v. Littlefield, 62 Texas, 31; Gunter v. Armstrong, 2 Texas Civ. App., 601; Taylor v. Jones, 24 Texas Civ. App., 201; Schintz v. Morris, 13 Texas Civ. App., 596; Enc. of Pleading and Practice, vol. 2, p. 378, and authorities there cited; Gaines v. Rugg, 148 U. S., 230; Texas & P. R. R. Co. v. Anderson, 149 U. S., 237; Aspen Mining Co. v. Billings, 150 U. S., 31; Chouteau v. Allen, 74 Mo., 56; Stewart v. Salamon, 97 U. S., 361; Am. and Eng. Enc. of Law, vol. 1, p. 621; Stapp v. Owens, 45 Ill. App., 488.

If the appellees were of the opinion when the judgment of the Court of Civil Appeals was entered on the former appeal, that on another trial of this case they would make proof that a part of the improvements placed upon said land were paid for with the separate means of their father, Sidney Summerville, they should have permitted said cause to come back to the trial court for another trial upon the merits of the case; and, inasmuch as said appellees saw fit not to accept the judgment of the Court of Civil Appeals in reversing and remanding said cause, and to carry said cause to the Supreme Court upon the statement that the opinion of the Court of Civil Appeals practically settled the case, they are now estopped from introducing testimony for the purpose of showing that any part of the improvements were paid for with the separate funds of Sidney Summerville. Sayles' Statutes, art. 941; Douglas v. Central Texas & N. W. R. R. Co., 90 Texas, 129; Ide & Son v. College Park Elec. Belt Line, 90 Texas, 509; City of Corsicana v. Kerr, 89 Texas, 464; Powell v. Texas & N. O. R. R. Co., 89 Texas, 663; Douglas v. Blount, 9 Texas, 499; Harvey v. Sutton, 94 Texas, 79.

The trial court erred in his third conclusion of law, wherein he concludes and finds that the plaintiff Olschewske is not entitled to any rents for the use and occupancy of said house by the plaintiffs. Hanrick v. Gurley, 93 Texas, 474; Hensel v. Kegans, 8 Texas Civ. App., 583, 587; Thompson v. Jones, 77 Texas, 626; Robinson v. Moore, 1 Texas Civ. App., 93; Hill v. Moore, 85 Texas, 335.

James R. Masterson, for appellee.

FLY, ASSOCIATE JUSTICE.—This is a second appeal of this case, the style of it on the former appeal being King v. Summerville, 80 S. W. Rep., 1050. On the former appeal the judgment of the trial court was reversed by this court, and a writ of error was obtained from the Supreme Court by the appellees on the ground that the judgment of this court

practically settled the case. The Supreme Court affirmed the judgment, and in its opinion coincided with this court on every point. The Supreme Court, as required of it by section 8 of article 941, Revised Statutes, practically rendered judgment in the case, and only remanded it for a partition of the property, which under the facts, could not be done by that court.

That court said: "We affirm the judgment of the Court of Civil Appeals reversing the judgment of the District Court, but the facts necessary to a final judgment have not been developed and the case will be remanded to the District Court to be disposed of under the following instructions: The plaintiffs are entitled to recover one-half of the land exclusive of improvements, which will be set apart to them if it can be so divided as to give to King the other half and improvements; if not, then the partition must be conducted in the usual way." As the law of 1905 on the subject of partition was in force when the trial was had, the court tried the case under that law, which requires the court to determine whether property is susceptible of partition, and if so, to appoint three or more commissioners to make the partition; but if not susceptible of partition, to order a sale of the real estate, which sale shall be made as under execution, or by private sale, through a receiver, if the court so order, and the proceeds divided. (Gen. Laws 1905, p. 95.)

This court, and afterwards the Supreme Court, had fully determined the shares or interests of the parties in the land in controversy, that is, that the Summerville heirs were entitled to one-half of the land, and King, the vendee of Olschewske, was entitled to the other half and all the improvements. When the District Court had determined, as it did, that the land was not susceptible of a fair and equitable division, we think it should have ordered a sale, with instructions that the report of the sale should show the value of the improvements and the value of the land separately, and then, when the report was made, it should have given the Summerville heirs one-half of the value of the land and have given to the other party one-half the value of the land and the whole value of the improvements.

We are unable to comprehend that the Summerville heirs had any equities to be adjusted. They own a one-half undivided interest in land on which certain improvements were erected with the community funds of their father and mother. Those improvements were sold by the survivor, their mother, to settle a mechanic's lien resting on them. This court and the Supreme Court held that the survivor had the right and authority to sell the improvements. The Supreme Court said: "The conveyance of Mrs. Hanks carried with it to Olschewske the improvements upon the property made with the community funds upon which the lien existed as well as the half interest in the land which belonged to her, and King is entitled in the partition of the lands to be compensated for the improvements." If the improvements alone had been sold by Mrs. Summerville—Hanks—Moran to Olschewske, he would have had the right to have removed them from the land. In effect it was so held in this case by the Supreme Court. What equities would the children then have had in the improvements? None whatever. If Olschewske would have had the authority to move the improvements in

that case he would have the authority to remove them if at the same time he bought one-half the land. Coupling a conveyance of the land with a sale of the improvements could in no way have created any equities in the children. If, as said by the Supreme Court, "Olschewske's vendee is entitled to receive the benefit of the improvements made with the community funds, which he bought from the surviving wife, as well as her half interest in the land," there are no equities to be adjusted between the parties. The children should have their one-half of the land, or its proceeds, and the vendee of Olschewske should have one-half the land and all the improvements, or their proceeds.

Such being our view of the case we have failed to understand how the equities as stated by the Supreme Court arose. That court said: "The court will ascertain the addition to the value of the land caused by the building of the house at the time the sale was made by Mrs. Hanks to Olschewske, and also the value of the lots conveyed by Olschewske; the sum of the amounts will constitute a charge against King, for the purpose of this case alone. The court will ascertain the value of Mrs., Hanks' interest in the lot at the time of the conveyance to Olschewske, the principal of the debt accrued on the property with interest and attorney's fee at the date of the said conveyance, also the amount paid by Mrs. Hanks for abstract of title and taxes on the land, and the sum of said items shall be a charge against plaintiffs' interest in the land. If the amount charged against King equals the sum charged against plaintiffs, King's equities will be satisfied and the court will consider the matter no further. If, however, the charge against plaintiffs be greater than the sum charged against King, then the court shall divide the excess equally, adjudge one-half to King with a lien on plaintiffs' interest in the land to be enforced through the Probate Court, unless it shall be necessary to sell the property for partition, in which case, the amount shall be paid out of the proceeds of plaintiffs' interest in the land." With the utmost deference and respect for that opinion we must say that we are unable to reconcile the equities suggested by the court with their ruling that one-half the land and all the improvements are the absolute property of King. If the improvements belonged at that time to King, now to Olschewske, and are so situated on the land as to prevent a division of the land, there can be no valid reason assigned for not allowing him the right to remove them to a point on the land so that the land can be divided, or to remove them from the land altogether. The children have no right in them whatever because their mother sold them, by and under authority of law, and that sale binds them as effectually as though they had made it themselves.

The trial court permitted witnesses to be introduced to show that the father of the Summerville children had paid $500 out of his separate estate on the improvements, and also permitted Olschewske to testify to a number of facts not bearing on the susceptibility of the land to be partitioned. Appellees having applied to the Supreme Court for a writ on the ground that the opinion of this court settled the case, confined their case to the testimony in the case at that time, and, when the Supreme Court affirmed the judgment of this court, the case could not be opened again for the purpose of hearing any testimony that might change the state of the case on the former appeal, except on the one

question specifically designated by the Supreme Court in its opinion on rehearing, which related to the homestead character of the land when the mechanic's lien arose. The evidence as to King having reconveyed the land to Olschewske does not come within this rule as it does not bear on the merits of the case. The law contemplates that when a writ of error is granted in a case in which there has been a reversal and remanding, by the Court of Civil Appeals, that the Supreme Court, in case it agrees with the judgment of the Court of Civil Appeal, should render judgment in accordance with the opinion of the last named court. In this case the Supreme Court did render judgment that the Summerville children should recover one-half the land in controversy and that King should recover the other half and all the improvements on the whole of the land, and the case was remanded merely to have a partition of the property in accordance with its judgment. No evidence was admissible save that bearing on the questions of homestead, and the susceptibility of the land to be partitioned.

The trial judge stated that Olschewske offered to move the improvements from the property, and we are of the opinion that he should have been permitted to do so; in which event the court could readily have divided the land without entering into the solution of the equities presented to it by the Supreme Court. The judgment will be reversed and the cause remanded.

Reversed and remanded.

ON MOTION FOR REHEARING.

In case appellant should desire to remove the improvements from the land, it will be the duty of the trial court, under the opinion of this court, as well as that of the Supreme Court, to authorize him to make such removal, and then partition the land as directed by those opinions. We do not conceive, as intimated by appellant, that there will be any effort, upon the part of the honorable judge who tried this cause, to evade the duties enjoined upon him by the Appellate Court in connection with this case, for his long record in public life has been one of duty well and fearlessly performed. He will do the right "as God gives him to see the right."

We are of the opinion that in the partition of the land appellant should recover of appellees their *pro rata* of the taxes paid by him on the land. (Kalteyer v. Wipff, 92 Texas, 673; Hanrick v. Gurley, 93 Texas, 458.) But as to compensation for the use of the premises, we do not think appellant should recover. Appellees are infants, and instituted this suit through their grandfather, as next friend. The doctrine of the payment of the rent by one tenant in common to another is based upon the ouster of one by the other. We do not understand that the minors in this case have been placed in such a position as to be liable for the use and occupation of the premises, if a minor could in any instance be held liable for ousting a tenant in common from the premises. We are unwilling to permit the interest of the infants in the land to be absorbed by rents alleged to have accrued to appellant for the time a few months before and while this suit has been pending. Those rents could not be

made a lien upon the land, as could the taxes, and the minors can not be held personally liable for them.

Nothing should be inquired into as to homestead rights except insofar as indicated in the opinion on rehearing by the Supreme Court. That question can affect nothing but the matter of attorney's fees.

Appellees obtained a hearing by the Supreme Court, on the former appeal of this case, by representing that the opinion of this court had settled the case, and they can not now repudiate that representation and again reopen the case in the trial court. They will not be permitted to play fast and loose with courts, but will be compelled to act in consonance with the dictates of fairness and the demands of good faith. They fixed the status of their case by their voluntary representations and can not render judicial proceedings farcical by filing new pleadings and making out a new case, in the face of their allegations that their facts had been exhausted. The Supreme Court had no authority to grant a writ of error except on the ground that the case was settled by the opinion of this court, and the statute in such case contemplates that the Supreme Court shall render final judgment. Insofar as it could be done the Supreme Court did render judgment and that judgment was that appellees should have one-half the land, or its proceeds, and appellant should have the other half and the improvements, or their proceeds. This is the decision of this court, and there is no desire or intention upon the part of this court to ignore or treat with contempt the decision of the Supreme Court, as is so impertinently insisted on by counsel for appellees. If the rights of the minor children have not been properly protected, as is insisted by counsel, it is not the fault of the trial judge, nor of the Appellate Courts, but it comes from a failure to fully show the rights of the minors in the improvements, which failure was followed by a representation that the case had been fully developed. If appellees had acquiesced in the former decision of this court, they could on another trial have fully developed their case, but that was not done, and a writ of error was applied for, and the judgment of this court affirmed, and thereby every avenue for reopening the case on the facts was closed to the minors, whose interests, according to the motion for rehearing, have not been properly protected.

The motions for rehearing are overruled except as to the taxes as hereinbefore indicated.

Motion overruled.

Writ of error dismissed.

W. E. SCHAFFER v. ABRAHAM HEIDENHEIMER.

Decided June 6, 1906.

1.—Deed—Description of Land—Repugnancy.

Every part of a deed must be given effect if possible, and the largest estate arising from its terms will be given to the grantee. But the intent of the parties, as in all contracts, when it can be arrived at from the deed, should prevail, unless contrary to law.

2.—Same—Particular Description—General Description.

Where a deed, after describing the land conveyed by metes and bounds, contained a reference to another deed for a further description, and a repug-

nance is found to exist between the field notes given and the description in the deed referred to, the field notes will control.

Appeal from the District Court of Liberty County. Tried below before Hon. L. B. Hightower.

Baldwin & Christian, for appellant.—The trial court erred in rendering judgment for the plaintiff Abraham Heidenheimer for the land, or any part of the land, involved in this suit, for the reason that, under the agreed facts in the case, the plaintiff was not entitled to recover. Cartwright v. Trueblood, 90 Texas, 535; Hancock v. Butler, 21 Texas, 816; Peck v. Hensley, 20 Texas, 677; Burleson v. Burleson, 28 Texas, 415; Perry v. Rice, 10 Texas, 373; Faulk v. Daschiel, 62 Texas, 646; Brown v. Chambers, 63 Texas, 135; Jordan v. Young, 56 S. W. Rep., 762; Lauchheimer v. Saunders, 27 Texas Civ. App., 485; Sanger v. Roberts, 92 Texas, 316; Arambula v. Sullivan, 80 Texas, 621; Smith v. Chatham, 14 Texas, 328; Devlin on Deeds, secs. 848, 1039, 1040, 1041; Martindale on Conveyancing, sec. 108; Enc. of Law & Pro., vol. 13, p. 632; Lauchheimer v. Saunders, 27 Texas Civ. App., 485; Dodge v. Nichols, 5 Allen (Mass.), 548; Foss v. Crisp, 20 Pick. (Mass.), 121; Boone v. Clark, 129 Ill., 499 to 502; Am. and Eng. Ency. of Law (2d ed.), vol. 17, p. 10.

Where a deed refers to another deed or a map or a survey, and makes the same a part thereof, it has the effect to incorporate such deed, map or survey so referred to into the description the same as if copied into the deed itself, and all that is therein described will pass by such a conveyance; and inasmuch as the deed under consideration referred to the deed from the administrator of John S. Sydnor to Sampson Heidenheimer, recorded in book D, pages 326 to 328 of the deed records of Liberty County, and made it a part thereof for the description of the land intended to be conveyed, and inasmuch as the deed referred to described accurately the entire south three-fourths of said league, it passed to the grantee, Victor B. Wilson, the entire south three-fourths regardless of the description by metes and bounds contained in said deed. Brown v. Chambers, 63 Texas, 135; Jordan v. Young, 56 S. W. Rep., 762; Devlin on Deeds, sec. 1040; Martindale on Conveyancing, sec. 108; Enc. of Law & Pro., vol. 13, p. 632, and other authorities cited under our first proposition.

Jas. B. & Chas. J. Stubbs and *J. F. Dabney,* for appellee.—A deed should be construed so as to give effect to the intention of the grantor. Farley v. Deslonde, 58 Texas, 591 (same case, 69 Texas, 460); Cravens v. White, 73 Texas, 579; Tendick v. Evetts, 38 Texas, 281; Hancock v. Butler, 21 Texas, 806; Pugh v. Mays, 60 Texas, 193; Cleveland v. Sims, 69 Texas, 155; Haldeman v. Chambers, 19 Texas, 45.

A deed capable of two constructions, one of which is consistent with an intention on the part of the grantor to do that which is lawful, and the other showing an intention to do that which is unlawful, will be construed so as to support the former intention. Hancock v. Butler, 21 Texas, 804; Macmanus v. Orkney, 91 Texas, 31; Laval v. Staffel, 64 Texas, 373; Pugh v. Mays, 60 Texas, 193; Smith v. Brown, 66 Texas, 545.

The rule that the courts will confer on the grantee the greatest estate that the terms of the deed will permit, is subordinate to the rule that every part of the instrument should be harmonized and given effect to, if it can be done. Cartwright v. Trueblood, 90 Texas, 538; Risien v. Brown, 73 Texas, 141; Calder v. Davidson, 59 S. W. Rep., 302; Hancock v. Butler, 21 Texas, 816; Smith v. Westall, 76 Texas, 511.

A particular description in a deed will control a general description. Cullers v. Platt, 81 Texas, 263; Boggess v. Allen, 56 S. W. Rep., 195; Sanger Bros. v. Roberts, 92 Texas, 316; Cartwright v. Trueblood, 90 Texas, 538; Koenigheim v. Miles, 67 Texas, 123.

FLY, ASSOCIATE JUSTICE.—This suit was instituted by appellee against appellant, and several others, to recover 417 acres of land in Liberty County, off the south three-fourths of the William Whitlock league of land. The suit was dismissed as to all the defendants except appellant, who pleaded not guilty. A trial, without a jury, resulted in a judgment in favor of appellee.

Both parties claim through Samson Heidenheimer. Appellant claims through a deed made by Samson Heidenheimer to Victor B. Wilson in which the land is described as follows: "All that certain tract or parcel of land found to contain 2,906 acres by a recent survey made by J. G. Minter lying and being situated in the county of Liberty and State of Texas, being off of the south ¾ of a league of land originally granted to William Whitlock." The above is followed by field notes, after which it is recited in the deed: "Being the same land which was conveyed to me by Seabrook W. Sydnor, administrator *de bonis non* of the estate of J. S. Sydnor, deceased, by deed dated December 12, A. D. 1878, and recorded in Liberty County deed records in book D, pages 326 to 328, to which deed and the record reference is here made and the same is made a part hereof. Said deed was recorded in Liberty County, January 24, A. D. 1879."

It was agreed by the parties: "That the defendant, William E. Schaffer, is now the legal owner of whatever title was conveyed to Victor B. Wilson by the instrument last above mentioned; and if said deed does not convey to said Victor B. Wilson the entire south ¾ of said league, then the plaintiff, Abraham Heidenheimer, is the legal owner of whatever interest, in the south ¾ of said league, which remained in Samson Heidenheimer, after the conveyance to Victor B. Wilson by Samson Heidenheimer, above mentioned." It was also admitted that the field notes in the aforementioned deed did not include a certain portion off of the west end of the south ¾ of William Whitlock survey.

The sole question presented is, which should prevail, the description by field notes, or the general description following them which describes the land as that conveyed to the grantor by the administrator? If the description by field notes should prevail, the judgment is correct, but if the general description with reference to the deed of the administrator should prevail, the judgment should have been rendered in favor of appellant.

Before entering into a discussion of the points at issue we will refer to the description of the land given in the deed of the administrator to Samson Heidenheimer, which may be of some moment in the solution

of the question. It is as follows: "All that certain tract or parcel of land lying and being in Liberty County, State of Texas, containing 2,906 acres, consisting of the lower three-fourths of a league of land originally granted by the Mexican government to William Whitlock, now deceased, by concession of date the 11th day of May, 1831, and which said land was conveyed to John S. Sydnor by Mary Whitlock et al., by deed bearing date the 15th day of April, A. D. 1852, and also including the interest of said John S. Sydnor, deceased, conveyed to him by Robert Whitlock by deed of date the 3d day of September, A. D. 1853, to which two deeds above mentioned reference is here made for a more particular description of said property."

It is the rule that every part of a deed must be given effect if possible, and the largest estate arising from its terms will be given to the grantee. If there be ambiguity so as to render it susceptible to two constructions, that construction will be given it that is most favorable to the grantee. (Cartwright v. Trueblood, 90 Texas, 538.) It is also the rule that the intent of the parties, as in the case of all contracts, when it can be arrived at from the deed, should prevail, unless contrary to law. (Dev., Deeds, sec. 836.) The entire deed must be read and such construction as will, if possible, give effect to every portion of the deed. These rules will be kept in view in construing the deed which forms the basis of dispute in this case.

It appears from the deed of Sydnor to Samson Heidenheimer that although the amount of land was described as 2906 acres, it was the intention of the grantor to convey ¾ of the Whitlock league, but when the grantee in that deed conveyed the land, it was surveyed presumably for his benefit and it is fully described by the field notes of that survey. We say that it was described by the field notes of that survey, although it is not specifically so stated in the deed. But the clear inference is that those are the field notes used in the deed to Victor B. Wilson. Those field notes describe 2,906 acres of land and the description is clear and explicit. That description is followed by the words "being the same land conveyed to me by Seabrook W. Sydnor," etc., and we do not think they create an ambiguity in the deed. It is not stated that it is all of the land conveyed by Sydnor but the "same land." It was the same land but not all of it. This construction is borne out by the description given before the field notes are set out where the land is described, not as the south ¾ of a league of land, but as "being off of the south ¾ of a league of land originally granted to William Whitlock." If the whole had been intended the land would not have been described as "being off" the ¾ of a league. We think it clear that the reference to the deed made by Sydnor to Samson Heidenheimer was given merely to point out the title and not to supplement or control the description given by the field notes. There is ample authority to sustain this proposition.

In the case of Brown v. Heard (Me.), 27 At. Rep., 182, it is said: "It was contended that the clause in plaintiff's deed, at the end of the particular description of the premises by metes and bounds, 'meaning and intending to convey to the said Heard the same premises conveyed to me,' etc., should enlarge the specific description in it given by metes and bounds. Assuming that the language referred to a larger estate

than is included by the metes and bounds given, which is by no means certain, the contention can not prevail. It is merely a help to trace the title, but can not enlarge the grant."

So in the case of Smith v. Sweat (Me.), 38 At. Rep., 554, the words, "meaning and intending to convey the same premises conveyed to me," etc., were used after a description by metes and bounds, and the court said: "There is no ambiguity in these descriptions. Fixed and definite boundaries are given, and these boundaries must prevail, unless we are to attach more importance to a mere reference to source of title, or an intention clause, than to specific descriptions; and this we have seen can not be done. Words of reference or of explanation or intention never destroy a specific grant." This principle is spoken of by the Maine court as being too well settled to require the citation of authorities.

In Lovejoy v. Lovett, 124 Mass., 270, after a description by metes and bounds was used the words, "being the same premises conveyed to me by Ezra Holden, by deed dated May 7, 1829," were inserted, and it was held that those words should not overcome the inference to be drawn from the other parts of the deed. "Reference is made to the Holden deed, not for the purpose of fixing the metes and bounds, as if describing the lot conveyed, but to show the grantor's chain of title."

Citing the Massachusetts case with approval, in Cullers v. Platt, 81 Texas, 858, the court said: "Where a grantor conveys specifically by metes and bounds, so there can be no controversy about what land is included and really conveyed, a general description as of all of a certain tract conveyed to him by another person, or as in this case, all of a survey except a tract belonging to another person, can not control, for there is a specific and particular description about which there can be no mistake and no necessity for invoking the aid of the general description."

In the case of Sanger v. Roberts, 92 Texas, 312, the Supreme Court discussed the question and said: "We concur in the proposition announced by the Court of Civil Appeals, that when there is a repugnancy between a particular description of a tract of land in a deed and a general description, the former will, as a general rule, control. In other words, where the premises are described by metes and bounds and that is followed by a reference to some other writing for a further description, the latter can not ordinarily be looked to to enlarge the former."

There can be no doubt as to the correctness of the judgment of the lower court and it is, therefore, affirmed.

Affirmed.

Writ of error refused.

NAT GREER v. INTERNATIONAL STOCK YARDS ET AL.

Decided June 6, 1906.

1.—Earnest Money—Suit to Recover.

In a suit to recover money advanced by plaintiff on a written contract to purchase land, and for damages for the failure of defendants to deliver possession of the premises contracted for, the principles applicable to specific performance of contracts may be looked to in determining the questions involved.

2.—Contract for Purchase of Land—Specific Performance—Limitation Title.

In an action for specific performance upon an ordinary contract for the purchase of realty, where the vendor's title by limitation is so clearly established as to make it a matter of law as distinguished from a question of fact, the contract will be enforced; but when the state of the evidence is such as to make the question of title one of fact which must be submitted to the jury, as is ordinarily the case, specific performance of the contract will not be decreed.

3.—Rejection of Title by Attorney Specified—Conclusive.

Where a contract for the purchase of property is made subject to the approval or acceptance of the title by the purchaser's attorney, if such attorney disapproves of the title or refuses to accept the same, the vendor can not enforce specific performance of the contract, in the absence of bad faith and unreasonableness on the part of the attorney.

4.—Failure to Deliver Possession—Damages.

Where the contract provided that in the event the vendors failed to deliver possession of the premises in question within a certain time they should pay a stipulated sum as liquidated damages, and the vendee refused to accept the title tendered, he was not entitled to recover damages for failure to deliver possession of the premises.

Appeal from the District Court of El Paso County. Tried below before J. M. Goggin.

T. A. Falvey and *Walters Davis,* for appellant.—A title by limitation, dependent upon oral evidence, is not a good and sufficient and a marketable title, as found by the court, or such title as was required by the contract between plaintiff and defendants. Moling v. Mahon, 86 S. W. Rep., 959; Hollifield v. Landrum, 71 S. W. Rep., 981; Moore v. Williams, 115 N. Y., 586; Burwell v. Jackson, 9 N. Y., 535; Delavan v. Duncan, 49 N. Y., 485; Vought v. Williams, 8 Law Rep. Ann., 592; Brooklyn Park Coms. v. Armstrong, 45 N. Y., 234; Moore v. Williams, 115 N. Y., 586; Swayne v. Lyon, 67 Pa., 436; Irving v. Campbell, 8 Law Rep. Ann., 621.

A vendor who contracts to furnish the vendee with "a good and sufficient title," must furnish a written marketable title, or the vendee is entitled to a rescission of the contract. Hollifield v. Landrum, 71 S. W. Rep., 981; Moling v. Mahon, 86 S. W. Rep., 959; Vought v. Williams, 8 Law Rep. Ann., 592.

A vendee who has contracted for "a good and sufficient title," is not bound to accept a title by limitation dependent on oral proof to establish the same. Hollifield v. Landrum, 71 S. W. Rep., 981; Moling v. Mahon, 86 S. W. Rep., 959; Vought v. Williams, 8 Law Rep. Ann., 592.

The acceptance by Turney & Burges of the title was a condition precedent by the contract before plaintiff was compelled to receive the same. Moling v. Mahon, 86 S. W. Rep., 958; Boettler v. Tendick, 5 Law Rep. Ann., 270, and notes on pp. 272, 273; Church v. Shankling, 17 Law Rep. Ann., 207, and notes. Townshend v. Goodfellow, 12 Am. St. Rep., 740; Hedderly v. Johnson, 18 Am. St. Rep., 522; Shriver v. Shriver, 86 N. Y., 575; Pratt v. Eby, 67 Pa. St., 396.

The finding by Turney & Burges that defendants' title was good by limitation was not accepting such title as good and sufficient marketable title as required by the contract. Townshend v. Goodfellow, 12 Am. St.

Rep., 740; Hedderly v. Johnson, 18 Am. St. Rep., 522; Shriver v. Shriver, 86 N. Y., 575; Pratt v. Eby, 67 Pa. St., 396.

R. X. Burges and *Edwards & Edwards,* for appellees.—A title by limitation is always dependent upon oral evidence, and is a good and sufficient and merchantable title and such title as was required by the contract set out in plaintiff's petition. Fant v. Wright et al., 61 S. W. Rep., 514; Hubert v. Grady, 59 Texas, 506; Scannel v. American Soda Fountain Co., 61 S. W. Rep., 889, 161 Mo., 606; Hollifield v. Landrum, 71 S. W. Rep., 979; Am. & Eng. Cy. of Law, 2d ed., vol. 29, p. 613.

NEILL, ASSOCIATE JUSTICE.—This suit was brought by the appellant, Nat Greer, against appellees, the International Stock Yards Company, John Caldwell, Julia Caldwell and Felix Martinez to recover on the written contract, mentioned in our conclusions of fact, the sum of $1,000, advanced by appellant to appellees in pursuance thereof, and the further sum of $915 as damages stipulated for the failure of appellees to deliver possession of the premises, made the subject of such contract, within sixty days after the execution thereof.

The appellees, after interposing a number of exceptions (all of which were overruled) answered by a general denial, and by pleading specially that the title to the property, which was the subject of the contract was good and that the attorneys, to whom, by its terms, the title was to be submitted for approval and acceptance, would have by the use of reasonable diligence, decided that it was good; that as soon as the written opinion of said attorneys, disapproving said title and pointing out their objections thereto, was presented to appellees they (appellees) presented to said attorneys a statement in regard to said title which showed the same was good by the statute of limitations and that all objections made by them to the title were immaterial, or had been obviated by corrections, and that appellant was informed of such facts, and defendants, about the 7th of October, 1904, tendered appellant a good and sufficient title by warranty deed to said real estate and immediate possession of the premises and demanded that he carry out his contract, which plaintiff declined and refused to do, and that by reason of the premises he is not entitled to recover anything by this suit. They also pleaded that the clause in the contract upon which appellant predicated his action for liquidated damages was intended as a penalty and not a stipulation for such damages. Julia Caldwell filed a separate plea alleging coverture at the time, and ever since said contract was made.

The case was tried without a jury and judgment entered, upon conclusions of fact and law found, that the plaintiff recover nothing on his claim for the $1,000 sued for and that he have judgment on his demand for liquidated damages against the International Stock Yards Company and John Caldwell for the sum of $195.54. From the judgment so rendered this appeal is prosecuted.

Conclusions of Fact.—The agreement upon which appellant based his suit is in writing and was executed on the 25th of June, 1904, by the International Stock Yards Company, John Caldwell, Julia Caldwell and Felix Martinez, parties of the first part, and Nat Greer, party of

the second part. After reciting that the International Stock Yards Company, John and Julia Caldwell are owners of certain described real property situated in the city of El Paso and desire to sell the same to the party of the second part, and that he desires and is willing to purchase the same according to the terms and conditions set out therein, it contains the following agreements and stipulations:

"It is therefore agreed and stipulated as follows: That the parties of the first part agree to sell said property and premises to said party of the second part for the agreed sum of sixteen thousand ($16,000) dollars, one thousand dollars of which is to be paid upon the signing and delivery hereof, and the remaining fifteen thousand dollars to be paid whenever the parties of the first part shall deliver proper deed of conveyance, warranty in form, to said second party, and when Turney & Burges, attorneys for party of the second part, shall accept title to said premises heretofore described and shall approve deed therefor, provided said deed shall be tendered and said title be approved on or before six months from this date.

"It is agreed and understand that should the parties of the first part fail to make good and sufficient title to said premises, as hereinbefore stipulated, within said space of six months, and give full possession to said party of the second part of said premises, then, and in that event, all the parties of the first part agree and bind themselves to return to said second party said sum of one thousand dollars already paid, and release him from any and all obligations to carry out any of the other terms and conditions of this agreement.

"However, should said party of the second part fail and refuse to comply with his said agreement already provided for, and fail to accept said deed when tendered him, and said title being approved by his said attorneys, and fails to pay off the balance due under this contract, fifteen thousand dollars, that then and in that event he shall forfeit to the parties of the first part all of said sum of one thousand dollars already paid.

"It is agreed and understood that the parties of the first part are to have sixty days in which to deliver possession of said premises to said second party without penalty, but should they, the parties of the second part, not deliver possession of said premises to party of second part within sixty days, that then and in that event, for every day after sixty days, such party of the second part is deprived of the premises and possession thereof, and of said property, the parties of the first part agree and bind themselves to pay monthly the sum of seven and fifty one-hundredths dollars for each day during which they shall fail to deliver possession of said premises and property to said party of the second part, which payment and liability is to continue for the space of four months after the expiration of said sixty days, provided for herein." (The next succeeding paragraph in the agreement does not seem to be material to any issue in the case and will be omitted.)

"The respective parties hereto agree and bind themselves to carry out and perform all the provisions hereof, made binding on them respectively, said Felix Martinez, however, does not own or hold title to any of said property, but is to receive and hold said sum of one thousand dollars for the use and profit of all the parties of the first part, and is to, as far as he is able, carry out the provisions of this contract made binding upon

all the parties of the first part and, with the others of said parties of the first part, is responsible for the return of said one thousand dollars, should said party of the second part be released from the provisions of the same and should title to said property fail."

The trial judge, after finding that the foregoing contract was executed by the parties, in his conclusions of fact, found "that thereafter, appellees furnished appellant's attorneys, Messrs. Turney and Burges, an abstract of their title to the property described in the agreement; that after examining the abstract, said attorneys were of the opinion it did not show a good and sufficient title and disapproved the same giving a written opinion addressed to appellant, indicating defects in the title to the property as it was shown by the abstract, which opinion concluded as follows: 'For the reasons above pointed out we have been unable to approve the title of the International Stock Yards Company to said property, as shown in the abstract. Respectfully submitted, Turney and Burges;' that Mr. Turney, of the firm of Turney & Burges, informed plaintiff at the time that, although the record title as shown by the abstract was defective, the proposed grantors had a good title to the property by limitation, but advised Greer not to accept a title by limitation, and, when, on October 3, 1904, a deed to the property was tendered Greer, he rejected the same, and the title, as it stood under the advice of his attorneys; that on the 4th of October, 1904, Messrs. Edwards & Edwards, acting in behalf of the defendants, addressed a letter to Messrs. Turney & Burges, as attorneys for Greer, calling their attention to certain sources of information as to the record title, and also to the fact that the title in defendants had been made perfect by limitation, and also offering to relieve the title of two certain unreleased liens referred to in the letter of Turney & Burges to Greer.

"That notwithstanding the offer to release the liens and the fact that there was a perfect title by limitation in the proposed grantors, Turney & Burges advised the rejection of said title, and the same was rejected by Greer on the 3d day of October as well as the conveyance tendered, upon the ground there was no good and sufficient record title shown in the proposed grantors and that a good title by limitation was not sufficient and did not meet the requirements of said contract or agreement above set out and executed by the parties on the 7th day of July, 1904, and that the said Turney advised and informed the said Greer, however, at the same time that, in his opinion, said title of the defendants, The International Stock Yards Company and the Caldwells, was a good and provable title by limitation, but that he would not advise him to accept a title by limitation, and that he would not approve any title by limitation.

"That the record title of the defendants to the said property was defective and did not constitute by itself a good and sufficient title to said property, but that aided by limitation the said title was good and sufficient and a marketable title, and it was admitted by the parties in open court of record that the title held by the proposed grantors of the real estate described in the contract was a good title by limitation at the time the opinion of Turney & Burges set out in plaintiff's petition was given, and that William H. Burges, a member of the firm of Turney & Burges,

would testify if present that in his opinion the title was good by limitation at the time said opinion was given.

"The court further finds that on the 7th day of September, 1904, the time at which possession was to be yielded to the said Greer, or the grantors pay liquidated damages for failure to do so, the said Greer was willing to take possession thereof, but that he was unable to secure possession, and possession was not tendered him until October 3, 1904, at which time he refused title and possession, although up to that time he had been ready to take possession under the contract.

"The court further finds that on July 17, 1904, plaintiff paid defendants $1,000, under the terms of this contract, and about January 25, 1905, he demanded the return of said sum and same is still held by said defendants."

As evidence is found in the record tending to support these conclusions, so far as they are of fact, and only the finding that "the title of the International Stock Yards Company and the Caldwells by limitations is good" (which is rather a conclusion of law than of fact, and will be considered and disposed of as such in our conclusions of law) is gainsaid by appellant they will be adopted as the conclusions of this court.

Conclusions of Law.—Upon the foregoing conclusions of fact the trial court found conclusions of law, and, upon such findings entered the judgment appealed from.

The second assignment of error is that "the court erred in holding 'that a title perfected by limitation is a good and sufficient title, and falls within the terms and language used in said contract as much so as a good and sufficient record title;' that is, the words 'good and sufficient title' included a good and sufficient title by limitation as well as good and sufficient record title, or record title made good and sufficient by limitation; for the reason that such title by limitation was not the title contracted for by the plaintiff."

We take it that the principles applicable to specific performance of contracts may be looked to in determining the question presented. If, in view of such principles, in a suit brought by appellees against appellant to compel him to perform his contract to purchase the land, he would be held, were it not that the damages for such failure stipulated by the contract, to its performance, then, he should not recover in this action, for the reason the money sued for is the damages stipulated for his failure to do what otherwise, he should do under the contract. On the other hand, if in such a case, it should be held the appellees would not be entitled to a decree of specific performance against him, then, he should recover the money sued for, for, in that event it would be apparent that the damages it was intended to cover had not accrued.

In an action for specific performance, "if there arises, either on the face of the pleadings, or from the examination made during the progress of the suit, a reasonable doubt concerning the title to be made and given by the vendor, the court, without deciding the question between the parties then before it—which decision might not be binding upon other persons, and, therefore, might not prevent the same question from being subsequently raised by other claimants of the land—regards the existence of this doubt as a sufficient reason for not compelling the purchaser to

carry out the agreement and accept a conveyance." (Pomeroy on Contracts (Specific Performance), sec. 198.) This is the rule stated by the eminent author, after an exhaustive examination of the authorities, both English and American, which are cited in a note following its enunciation. While a very few of the cases cited are accessible to this court, an examination of those that are, and others upon the same question, are enough for the deduction of the rule stated.

Upon the same subject it is said by Waterman on Specific Performance, sec. 412, that "although no general rule can be laid down as to the kind of doubt which will induce the court to withhold a decree of specific performance, yet it will do so, if a third person has an interest in, or a claim against the property, however improbable it be that the right will be exercised; for the decree of the court is *in personam,* and not in rem, and binds only those parties to the suit, and persons claiming under them. 'Every purchaser of land has a right to demand a title which shall protect him from anxiety, lest annoying, if not successful, suits, be brought against him, and probably take from him, or his representatives, land upon which money was invested. He should have a title which should enable him, not only to hold his land, but to hold his peace; and if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its market value.' When doubts are raised by extrinsic circumstances, which neither the purchaser nor court can satisfactorily investigate, for want of means to do so, the court will refuse its aid. But a threat, or even the possibility of a contest, will not suffice to cast a reasonable doubt on the title. The doubt must be 'considerable and rational, such as would and ought to induce a prudent man to pause and hesitate; not based on captious, frivolous, and astute niceties, but such as produce real *bona fide* hesitation in the mind of the chancellor.' . . . Specific performance will not be decreed, unless the vendor can give a marketable title, even though a court might consider the title good. But there must be some debatable ground on which the doubt can be justified. A title may be doubtful because it depends on a doubtful question of law not settled by any binding authority, or of which different courts may take an opposite view, or where those who may hereafter claim an interest in the property, will not be concluded by the decree. A doubtful title can not be made marketable by an opinion of the court on a case stated between the vendor and vendee. A title depending upon the bar of the statute of limitations, may be a marketable title which a purchaser will be compelled to accept, if it clearly appears that the entry of the real owner is barred. Where a contract for the purchase of property is 'subject to the approval of the title by the purchaser's solicitor,' if the latter disapproves the title, the vendor, in the absence of bad faith or unreasonableness on the part of the purchaser or his solicitor, can not enforce specific performance of the contract."

Again, it is said by Fry on Specific Performance, secs. 579, 580, that "though the court may entertain an opinion in favor of the title, yet if it be satisfied that the opinion may fairly and reasonably be questioned by other competent persons it will refuse specific performance. . . . The court will never compel a purchaser to take title where the point on which it depends is too doubtful to be settled without litigation, or where the purchase would expose him to the hazard of such proceedings.

The court will not, to use the favorite expression, compel him to buy a lawsuit."

Upon this subject it is said by the Supreme Court of the United States, in Wesley v. Eelis, 177 U. S., 373, book 44 (L. E.), 811, after stating the equitable rule, that a defendant in proceedings for specific performance shall not be compelled to accept a title in the least degree doubtful, says: "It is not necessary that he should satisfy the court that the title is defective so that he ought to prevail in law; it is enough if it appear to be subject to adverse claims which are of such a nature as may reasonably be expected to expose the purchaser to controversy to maintain his title or rights incident to it. He ought not to be subject, against his agreement or consent, to the necessity of litigation to remove even that which is even a cloud upon his title. . . . Courts of equity do not force the purchasers to take any thing but a good title, and do not compel them to buy lawsuits." (See also Hedderley v. Johnson, 18 Am. St. Rep., 521.)

In Fahy v. Cavanagh, 44 Atl. Rep., 156, it is held, after an exhaustive examination and consideration of the authorities, that "if the title depends upon a question of fact, which is not a matter of record, and can not be so made, then the rule is . . . that the court will not compel an unwilling purchaser to take the title. 'In cases where the doubt in relation to title is one of fact, which the court is called on to consider, the general rule has been declared to be that the court will never compel a purchaser to take a title where the point on which it depends is too doubtful to be settled without litigation, or where the purchase would expose him to the hazard of such proceedings.'" (See also Townshend v. Goodfellow, 12 Am. St. Rep., 736.)

But from the principles stated it does not necessarily follow that a title resting upon the statute of limitations is insufficient to support an action for specific performance. Indeed it has been held, both in England and America, that a title by adverse possession may be so clearly proved, and be so free from doubt, as to be a proper foundation for a decree of specific performance against the purchaser. See Conley v. Finn (Mass.), 50 N. E. Rep., 461, and authorities cited.

We apprehend the rule to be, that, in an action for specific performance upon an ordinary contract for the purchase of realty, where the vendor's title by limitation is so clearly established as to make it a matter of *law* as distinguished from a question of fact, the contract will be enforced, but when the state of the evidence is such as to make the question of title one of fact which must be submitted to the jury, as is ordinarily the case, specific performance of the contract will not be decreed. Therefore, while the principle, "that a title perfected by limitation is a good and sufficient title," stated in this assignment, may be abstractly correct, yet if it does not appear as a matter of law that appellees had such a title; but if the state of the evidence is such as to make the question of title depend upon facts to be determined by a jury, or the court sitting as a jury, it would not follow that a good and sufficient title, such as was contemplated by the parties under the contract, had been tendered the plaintiff.

The court found that appellees had no title to the property except such as depended upon the statute of limitations. The only evidence intro-

duced to show title by limitations was the affidavits of Allen Blacker and William Treyer. Such affidavits would be no evidence whatever in a suit brought by Milton A. Jones (in whom the abstract furnished appellant by appellees shows an outstanding title to the premises) or those claiming under him, against appellees, or appellant, if he had taken the property, that Jones' title had been extinguished by limitations and a good and sufficient title had been acquired by limitations against him which was in the appellees when they tendered appellant a deed thereto. In other words, when appellant pointed out a defect, fatal to appellees' title, apparent from the abstract of title they furnished him, it rested upon them to show that they had title as a matter of law by virtue of the statute of limitations, and to prove this they only furnished affidavits to appellant and afterwards, upon the trial of this case, to the court, which would be no evidence at all in a suit brought against them by Jones, or those claiming under him, for the land. It can not, therefore, be said that title by adverse possession was so clearly proved and so free from doubt as to form a proper foundation for a decree of specific performance.

But let it be admitted *pro hac vice* that such title was so established, it by no means follows that appellees would, under the contract, have been entitled to compel appellant to take the land, had it not contained a stipulation of the damages for his failure to do so. Under the express provisions of the contract, the balance of the purchase money was not to be paid until defendants delivered to plaintiff "proper deed of conveyance, warranty in form, and when Turney & Burges, attorneys for party of second part (plaintiff) shall accept title to said premises heretofore described and shall approve deed therefor, provided said deed shall be tendered and said title approved on or before six months from this date," and contains this further stipulation: "it is agreed and understood that should the parties of the first part fail to make good and sufficient title to said premises, as hereinbefore stipulated, within said space of six months, and give full possession to said party of the second part of said premises, then and in that event, all parties of the first part agree and bind themselves to return said second party said sum of $1,000 already paid, and release him from any and all obligations to carry out the other terms and conditions of this agreement."

The undisputed evidence shows that Messrs. Turney & Burges refused to accept title to the premises. It is neither pleaded nor contended that such refusal was either arbitrary, capricious, captious or fraudulent. On the contrary the evidence shows that they were governed by the best interest of their client, their understanding of the law and the exercise of the soundest discretion, entrusted to them by all the parties to the agreement. Hear what Mr. Turney, who acted for his firm in the matter, says about it. Referring to the letter of this firm written on October 1, 1904, to plaintiff, he testified: "The firm of Turney & Burges disapproved the title as being a bad title." On cross-examination, in answer to questions asked by appellee's counsel, he testified: "You were never able to satisfy, or did not really satisfy us about these paragraphs two and three in our conversation, as I remember it. I told you I would waive everything except the Jones deed and the other deed, if they were not in the title we would approve the title. . . . You and

I discussed the gap in the title on many occasions, and I say to you now, I would have been glad to approve the title because of the situation we were in. I will say to you, I believe the title by limitation is established, but my instructions from him and my understanding was they wanted a merchantable title such as could be conveyed without extraneous objections each time. I don't believe in that." "Q. You made up your mind that there was no sufficient title except by limitation? A. I knew there was no title except by limitation. I know that now. Q. How do you know? A. I know it from the condition of the abstract. I knew it from what you and other people told me. Q. You made up your mind at the time you delivered your opinion you would not approve the title unless they showed you a record title? A. Unless it was a good record title, unless I could get a record title. Q. Unless you could get a record title you did not propose to approve it? A. Unqualifiedly that was my opinion. Had to be a legal title; would not approve a limitation title, unless it was litigated against all the parties claiming as against all other parties claiming, and when you told me there had been a suit tried in court against other parties, that did not affect me one iota. Q. And you simply turned down the title because you would not approve a limitation title? A. I will not approve this limitation title, such as you brought and such as they furnished, such as Mr. Greer furnished or such as anybody furnished. I understood from you and men that had been used to approving limitation titles here, did not claim adversely your contention here—Judge Caldwell, I understood he claimed adversely to what you claim. Q. And Judge Caldwell later brought suit for these lots? A. When I became acquainted with that fact, it made me more in doubt than ever about your limitation title, in which I took no stock. Q. Did you tell Greer this was a good title by limitation? A. I told Greer that it probably was a good title by limitation. Q. Did you use the word 'probable' in there—Didn't tell him it was a good title by limitation? A. I don't think I did. I told him that it could be shown to be good by limitation, it still would be uncertain, because there might be just as much proof on the other side in regard to the occupancy of the property—would be unsafe to buy a limitation title."

The rule is well settled that where a contract for the purchase of property is "subject to the approval or acceptance of the title by the purchaser's solicitor," if the latter disapproves of the title, or refuses to accept it, the vendor, in the absence of bad faith and unreasonableness on the part of the purchaser or his solicitor, can not enforce specific performance of the contract. (Molin v. Mahon, 86 S. W. Rep., 958; Waterman Spec. Perf., 550; Hudson v. Buck, L. R. 7 Ch. D., 683.)

As, under the contract, the title was to be approved by Turney and Burges, and the undisputed evidence shows that it was disapproved by them, we can see no escape of the appellees from refunding to the appellant the $1,000 advanced them under the contract with legal interest from January 25, 1905, the date on which appellant demanded of the appellees the return of the money. But, since the appellant refused to accept title and deed to the property, we can conceive of no principle of law or equity that would permit him to recover anything by reason of appellees' failure to yield him possession of the property at the time specified in the contract. Clearly he was not entitled to the possession

after rejecting the title and refusing to accept a deed to it, or, if he had taken possession and afterwards rejected the title and refused to go on with the contract, the appellees would be entitled to recover of him the rental value during the period of such possession.

The judgment of the District Court is reversed and judgment will here be rendered in favor of appellant against all the appellees, except Julia Caldwell for $1,000, with interest at the rate of 6 percent per annum from January 25, 1905.

Reversed and rendered.

Writ of error refused.

INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY v. JOHN L. WRAY.

Decided June 6, 1906.

1.—Negligence, When Question of Law.

Negligence becomes a question of law only when the act causing injury to another is in violation of statute, or when the undisputed evidence admits only of the inference that the commission of the act in question was negligence.

2.—Same.

Where an act is done by one in obedience to an order of his foreman the law will not declare the act of obedience negligence per se unless the danger of obeying the order was so obvious and glaring from the servant's standpoint at the time he undertook to obey it that no prudent man would have undertaken to obey it.

3.—Intervening Negligence of Servant.

When a servant is ordered by his vice-principal to take an engine from a siding onto the main track at a time when a train was due to pass said point, it is a question of fact for the jury whether or not the servant was guilty of negligence in failing to keep a lookout for the passing train, and whether or not such failure was the proximate cause of the injury.

4.—Testimony Contradicted by Physical Facts.

Where the positive testimony of witnesses on a question of negligence is contradicted by physical facts, an issue is thus raised which should be submitted to the jury.

5.—Contributory Negligence—Pleading—Charge.

When defendant pleads only certain acts of the plaintiff as constituting contributory negligence the charge of the court should be confined to the specific acts of negligence pleaded, and should not be so general as to include the submission of any other acts of negligence.

6.—Damages—Charge Approved.

See charge held to permit plaintiff to recover only fair compensation for the injuries received, and not subject to the objection that it permits plaintiff to recover double damages.

Appeal from the District Court of Anderson County. Tried below before Hon. B. H. Gardner.

N. A. Stedman, Jno. M. King and *N. B. Morris,* for appellant.—The court erred in refusing to give to the jury defendant's special charge No. 1, as follows:

"In this case the undisputed evidence shows that plaintiff ran his en-

gine onto the main line of the Fort Worth Division immediately in front of an approaching train in full view of him, and which he could have seen in time to have avoided the accident. You are therefore instructed that he was guilty of contributory negligence as a matter of law and can not recover. You will ,therefore return a verdict for the defendant." Because the undisputed evidence of plaintiff and his witnesses shows that he ran his engine out in front of an approaching train in full view of him, which he could have seen by looking, and admitted that he did not look and that it was his duty to look and therefore the court should have given the above special charge. Gulf, C. & S. F. Ry. v. Miller, 70 S. W. Rep., 25; St. Louis S. W. Ry. v. Branom, 73 S. W. Rep., 1064; International & G. N. Ry. v. DeOllos, 76 S. W. Rep., 224; Galveston, H. & S. A. Ry. Co. v. Brown, 95 Texas, 21; International & G. N. Ry. Co. v. Edwards, 15 Texas Ct. Rep., 681; Galveston, H. & S. A. Ry. v. Bracken, 59 Texas, 73; Gulf, C. & S. F. Ry. v. Hamilton, 17 Texas Civ. App., 82; Gulf, C. & S. F. Ry. v. Moss, 4 Texas Civ. App., 318; Sabine & E. T. Ry. v. Dean, 76 Texas, 73.

The undisputed evidence in this case shows that the order of Tabor, the foreman, to appellee to run his engine from the roundhouse, where it then was, and onto the main line of appellant's railroad was not the proximate cause of appellee's injuries, but that appellee's injuries were caused by a new intervening cause, i. e., appellee's own negligence in running his engine on the main line immediately in front of said train No. 7, without exercising ordinary care to discover the approach of said train No. 7, or the negligence of said switchman in misleading and misinforming appellee as to the time when said train No. 7 would reach Spring; or the negligence of said switchman in ordering or signalling appellee to run his said engine out upon said track at a time when he knew or by the exercise of ordinary care might have known that said passenger train was about to arrive at Spring, or the negligence of the servants of the defendant operating and running said passenger train No. 7 in coming into Spring at too great a rate of speed; or the negligence of said servants in operating said train No. 7 in failing to keep watch out for and preventing colliding with plaintiff's engine. It was error for the court to charge the jury as complained of in the above assignment. Texas & P. Ry. Co. v. Bigham, 90 Texas, 223; Seale v. Gulf, C. & S. F. Ry. Co., 65 Texas, 275; Denison & S. Ry. Co. v. Carter, 82 S. W. Rep., 782 (Supt. C. T.).

The court erred in refusing to give to the jury defendant's special charge No. 4, as follows:

"If the plaintiff was guilty of negligence in failing to exercise ordinary care to discover the approaching train with which he collided, and if his failure contributed to his injury, then he can not recover and it will be your duty to return a verdict for the defendant, although you may believe that all the other witnesses were also guilty of negligence concurring with him to produce the injury." Because said charge presents a material issue in the case which is not presented in the general charge. Texas Trunk Railway Company v. Ayres, 83 Texas, 269; Missouri, K. & T. Ry. Co. v. McGlamory, 89 Texas, 639; St. Louis S. W. Ry. Co. v. Rea, 87 S. W. Rep., 324; St. Louis S. W. Ry. Co. v. Hall, 85 S. W. Rep., 786; Missouri, K. & T. Ry. Co. v. Criswell, 88 S. W. Rep., 373;

Missouri, K. & T. Ry. Co. v. Jackson, 88 S. W. Rep., 406; Houston & T. C. Ry. Co. v. Patterson, 48 S. W. Rep., 749.

T. M. Campbell, S. A. McMeans and *A. M. Barton,* for appellee.—Negligence is, generally, a question of fact and becomes a question of law only when the act done is in violation of law, or when the undisputed facts admit of but one inference regarding the care of the party doing the act in question; in other words, to justify the court in instructing a verdict as requested by appellant in its special charge No. 1, the evidence must have been of such character that it left no room for ordinary minds to differ as to the question of plaintiff's negligence. Lee v. International & G. N. Ry. Co., 89 Texas, 588; Merchants, etc., Oil Co. v. Burns, 74 S. W. Rep., 759; Texas & Pac. Ry. Co. v. Best, 66 Texas, 118; Choate v. San Antonio & A. P. Ry. Co., 90 Texas, 88.

When a foreman gives an order, within the scope of his authority, if not manifestly unreasonable, those under him are bound to obey at the peril of losing their situation; and such commands are, in contemplation of law, the commands of the master and he is held responsible for the consequences. If the danger of obeying the order is not so glaring that no prudent man would have undertaken it, the law will not declare the servant's act of obedience negligence *per se,* but will leave it to the jury to say whether he ought to have obeyed or not. See foregoing statement. Galveston, H. & S. A. Ry. Co. v. Puente, 70 S. W. Rep., 363; San Antonio & A. P. Ry. Co. v. Stevens, 83 S. W. Rep., 235; Gulf, C. & S. F. Ry. Co. v. Duval, 35 S. W. Rep., 701; Galveston, H. & S. A. Ry. Co. v. Sanchez, 65 S. W. Rep., 893; International & G. N. Ry. Co. v. Smith, 30 S. W. Rep., 501; Chattanooga Elec. Ry. Co. v. Lawson (Tenn.), 47 S. W. Rep., 489.

If, under the rules and regulations of the railroad company, it was the duty of Wray, in bringing the switch engine onto the main line, to keep a lookout for approaching trains, and if Wray failed to obey such rules on the occasion in question, such failure was not negligence *per se,* but it was a question for the jury to determine whether, under all the facts and circumstances in evidence, such disobedience was negligence. Galveston, H. & S. A. Ry. Co. v. Adams, 94 Texas, 100; Texas & N. O. Ry. Co. v. Mortensen, 66 S. W. Rep., 99; Missouri, K. & T. Ry. Co. v. Pawkett, 68 S. W. Rep., 323; Missouri, K. & T. Ry. Co. v. Follin, 68 S. W. Rep., 810; Gulf, C. & S. F. Ry. Co. v. Cornell, 69 S. W. Rep., 980.

An act of negligence is the proximate cause of an injury when without such act of negligence the injury would not have occurred. International & G. N. Ry. Co. v. Ormond, 64 Texas, 489.

What is the proximate cause of an injury is ordinarily a question for the jury, and is not a question of law, science or legal knowledge. "The common knowledge and experience of jurors and their acquaintance with the affairs of life, and the motives of men acting under different conditions are specially called into request in determining such questions." Eames v. Texas & N. O. Ry. Co., 63 Texas, 666; Jones v. George, 61 Texas, 346; Mexican Nat. Ry. Co. v. Mussette, 86 Texas, 719; International & G. N. Ry. Co. v. Eckford, 71 Texas, 279.

Tabor having been guilty of negligence in ordering Wray to move his engine out on the main line at the time he did (and this proposition

does not seem to have been denied or controverted by appellant), then his negligence was the negligence of the railroad company. One guilty of negligence is deemed, in law, to have foreseen, and is liable for, all consequences which may naturally ensue without the intervention of some other independent agency, although in advance the actual result might have seemed improbable. Bunting v. Hogsett (Pa.), 23 Am. St. Rep., 192; Quigley v. Delaware, etc., Co. (Pa.), 24 Am. St. Rep., 504.

Tabor having been guilty of negligence in giving the order to Wray, as found by the verdict of the jury, and his negligence being the negligence of the master, and Wray not being guilty of contributory negligence in obeying, the fact that the negligent order set in motion a train of other negligent acts on the part of other servants of defendant, all of which became the negligent acts of the same common master, did not break the causal connection between Tabor's negligence and Wray's injury, although such acts on the part of said other servants might have concurred in producing the injury. Gonzales v. Galveston, 84 Texas, 6; Jackson v. Galveston, H. & S. A. Ry. Co., 37 S. W. Rep., 786.

The order given by Tabor being within the scope of his authority, and not manifestly unreasonable, Wray was bound to obey, at the peril of losing his situation; and said order being, in contemplation of law, the command of the master, and the jury having found that the giving of same was negligence that proximately caused Wray's injury, the master must be held responsible for the consequences. Galveston, H. & S. A. Ry. Co. v. Puente, 70 S. W. Rep., 363; Gulf, C. & S. F. Ry. Co. v. Duval, 35 S. W. Rep., 701; San Antonio & A. P. Ry. Co. v. Stevens, 83 S. W. Rep., 235.

If there is evidence sufficient to warrant a reasonable belief of the existence of the fact which is sought to be inferred, the court is bound to submit the issue to the jury. That the evidence is conflicting, or that it apparently preponderates in favor of the one or the other, or that it is circumstantial and offered in contradiction to direct evidence, does not alter the rule. Washington v. Missouri, K. & T. Ry. Co., 90 Texas, 314; Shifflet v. St. Louis S. W. Ry. Co., 44 S. W. Rep., 919; Texas & Pac. Ry. Co. v. Robertson, 82 Texas, 661; Gulf, C. & S. F. Ry. Co. v. Kizziah, 22 S. W. Rep., 110, 26 S. W. Rep., 242.

NEILL, ASSOCIATE JUSTICE.—This is an appeal from a judgment of $10,000 recovered by appellee for personal injuries alleged to have been sustained by reason of appellant's negligence.

Conclusions of Fact.—The evidence is sufficient to sustain the following conclusions of fact: (1) On October the 3d, 1903, the appellee, John Wray, while in the employ of appellant in the capacity of a switch engineer at Spring, Texas, and in the discharge of the duties of his employment, was ordered by his foreman to run his engine from the roundhouse onto the main line of defendant's railroad, at a time when the foreman, by the exercise of ordinary care, should have known that a collision between appellee's engine and a passenger train would likely occur if the order was obeyed by appellee. (2) Also, that appellee, in running his engine as directed by his foreman, was subject to the orders and direction of appellant's yard switchman, Rogan, who, by signals

directed appellee to run his engine onto the main track of appellant's road at a time when said switchman by the exercise of ordinary care might have known train No. 7 was about to arrive at Spring and that a collision between said train and appellee's engine would probably occur if appellee, in obedience to his orders and signals, ran his engine on the main line of road. (3) That the employes of appellant operating the engine drawing train No. 7 in entering Spring failed to have said train under control, as required by the rules of appellant, and failed to keep a watchout for the purpose of preventing a collision with appellee's engine. (4) That the orders, signals and omissions of appellant's servants stated in the foregoing findings were, in every of such findings, acts of negligence chargeable to appellant. (5) That such acts of negligence, operating singly or concurring, were, without any contributory negligence on the part of appellee, the direct cause of a collision between train No. 7 and appellee's engine, by reason of which appellee sustained serious and permanent physical injuries to his damage in the amount found by the jury.

Conclusions of Law.—1. Our conclusions of fact dispose of the first assignment of error, which complains of the court's refusal to peremptorily instruct a verdict for appellant, at its request. It is too well settled to require discussion that negligence becomes a question of law, only when the act causing damage to another is in violation of statute, or when the undisputed evidence admits of the inference only, that the commission of the act in question was negligence. (Lee v. International & G. N. Ry., 89 Texas, 583; Bonn v. Galveston, H. & S. A. Ry., 82 S. W. Rep., 808; Virginia Portland Cement Co. v. Luck, 49 S. W. Rep., 582.) The appellant was charged with knowledge of the whereabouts of its trains, for it was its bounden duty to know where they were. The plaintiff was charged with no such knowledge or duty. He had the right to rely and act upon information given him by the defendant through its officers or agents ordering and directing his work. With the knowledge imputed to it by the law, of the whereabouts of train No. 7, the appellant, through its agent, who was appellee's vice principal, ordered appellee to take his engine from the roundhouse and run it onto the main track where a collision between it and train No. 7, would almost inevitably occur. This order was followed by signals from the switchman, which it was appellee's duty to take and obey, given, almost at the point and time of the collision, to appellee to run his engine on the main track. Orders and signals more pregnant with danger, of which appellee was utterly oblivious, can hardly be conceived. And yet, because appellee, who relied upon appellant's discharging its duty not to place him in a position of peril, failed to discover the proximity of train No. 7 to the place on the main track, where the collision occurred, it is seriously contended by appellant that he was guilty of contributory negligence as a matter of law. Where an act is done by one in obedience to an order of his foreman, the law will not declare the act of obedience negligence *per se,* unless the danger of obeying the order was so obvious and glaring from the servant's standpoint at the time he undertook to obey it that no prudent man would have undertaken it, but will leave it to the jury to say whether he ought to have obeyed it or not. (Galveston, H. & S. A.

Ry. v. Puente, 70 S. W. Rep., 362; San Antonio & A. P. Ry. v. Stevens, 83 S. W. Rep., 235; Henrietta Coal Co. v. Campbell, 211 Ill., 216, 71 N. E. Rep., 863; Chicago & E. I. R. Co. v. Heerey, 68 N. E. Rep., 74; Western Stone Co. v. Musical, 196 Ill., 382, 63 N. E. Rep., 664, 89 Am. St. Rep., 325.) As the evidence shows that train No. 7 came up from behind the appellee, and the point of collision was where the main track intersects the track on which his engine was at an acute angle and that he was watching and taking signals from the switchman in front of him, we can not perceive how he can be held guilty of negligence *per se* in not discovering the train in time to prevent the collision. Nor can it be said that his failure to lookout for the train on the main track while he was running his engine over the short intervening space between the roundhouse and coal car standing on a track between the one he was on and the main track was negligence as a matter of law proximately contributing to the collision.

2. The second assignment of error complains of the court's submitting as issues of negligence, on the part of appellant, the order of appellee's foreman and the signals of his switchman directing him to run his engine onto the main track, upon the ground that such acts, even if negligent, were not the proximate cause of the collision, appellee's failure to keep a watchout for trains on the main track being an intervening and the efficient cause. This assignment is simply a rehash, in a different form, of the one just considered. Unless it can be said that the evidence shows that appellee was guilty of negligence as a matter of law in failing to keep a lookout for train No. 7, and that such failure was the proximate cause of the collision, such failure can not be said to be an intervening cause which relegates all others and is of itself the efficient cause of the accident. Therefore, this assignment is disposed of in what we have said in passing upon the other.

3. The third assignment of error is directed against that part of the court's charge which submits to the jury the issues as to whether appellant's servants operating train No. 7 failed to have said train under control, or to keep a lookout, and, in event the jury should find they failed in either, or both, to find whether such failure was negligence, and, if negligence, whether it was the proximate cause of the collision, the contention being that the undisputed evidence shows that such servants were not guilty of either of such alleged acts of negligence. We do not think that no other conclusion than that contended for can be deduced from the evidence. Though the servants operating said train testified that the train was under full control, that is, its speed did not exceed six miles an hour, the jury may have, from the physical facts shown by the collision, disbelieved them. For when the effects of the force of the impact is considered, it may be concluded that such effects could not have been produced by a train running at no greater speed than six miles an hour. Though the servants operating the train testified that they did keep a lookout, this testimony may not have been believed, from the fact that appellee's engine was not seen by any of them until run into by their train. The charge complained of by this assignment is correct as far as it goes, and if appellant thought it was not full enough, or omitted

anything it wished presented in connection with it, a special charge should have been prepared and requested by it correcting such supposed defects.

4. The fourth, fifth and sixth assignments of error, which complain of the court's failure to give certain special charges requested by appellant upon the issue of contributory negligence, are overruled because, upon such issue, the court, in its main charge, fully and correctly instructed the jury as follows: "You are further instructed that if you believe from the evidence, that plaintiff failed to exercise ordinary care to observe the situation about him and discover the approaching train with which his engine collided in time to avoid the collision, and you further believe that by the use of ordinary care he could have observed said train in time to have avoided the collision, and that his failure to do so was negligence which, in any degree, contributed to his injury, then he would be guilty of contributory negligence as a matter of law; and if you so believe, you must return a verdict for defendant; and this is so, although you may believe that any or all the other employes in question were also guilty of negligence concurring with his to produce the injury." Besides, special charges Nos. 5 and 6, involved in these assignments, are too general, in that they make *any act* of negligence on the part of appellee, contributory to his injury, a defense to his action. Whereas appellant only pleaded his failure "to notice what was going on about him, and running his engine right in front of another engine on defendant's road in full view of him in broad daylight." A charge on contributory negligence, like a charge on any other character of negligence, should be confined to the specific acts of negligence pleaded and should never be so general as to include the submission of any other acts of negligence.

5. On the measure of damages, the court instructed the jury as follows: "If under the foregoing instructions you find for plaintiff, then in estimating his damages you may take into consideration his time lost, if any, the impairment of his capacity to labor and earn money in the future, if any, his mental and physical suffering, present and future, if any, and in your dispassionate judgment allow him such a sum as will fairly compensate him insofar as the evidence may have shown you he is entitled to damages in these respects." This is objected to by appellant upon the ground that it allows double damages. We are unable to place such a construction upon it. A fair compensation for injuries sustained is all the damage the charge permits him to recover. In estimating it the jury are allowed to take into consideration certain well-known elements of damages, specified in the charge. No one of these elements includes or runs into any other; the charge does not repeat any one of these elements; nor allow double recovery on a single one of them, nor anything more than just compensation.

6. What we have said in considering previous assignments disposes of all others adversely to appellant.

The judgment is affirmed.

Affirmed.

Writ of error refused.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY v. B. W. PEARCE.

Decided June 6, 1906.

1.—Statement of Facts—Stenographic Transcript—Law of 1905 Construed.

When the caption of the transcript of the evidence identifies the case in which it was prepared by style and number, and by a statement of the cause tried, and date of trial, and gives the names of the attorneys for each party, it fully identifies the cause to which it relates.

2.—Same.

An agreement of parties to a statement of facts prepared by a stenographer while proper is not necessary under the law of 1905, and the certificate of the trial judge need not show that a disagreement existed before such statement was approved by him. It is sufficient if the official stenographer prepared the transcript of the evidence at the request of one of the parties.

3.—Same—Documentary Evidence.

The stenographer's statement need only contain oral evidence, objections to same, rulings of the court, etc. Documentary evidence is not required to be copied into such statement, but may be sent up in the original form at the request of either party by written direction of the court, or transcribed by the clerk into the record.

4.—Railroad—Overflow of Land—Rev. Stats., Art. 4436, Construed.

The provisions of article 4436 of the Revised Statutes applies to water overflowing from an adjacent stream as well as to surface water.

5.—Assignment of Error—Statement Thereunder.

A reference to another part of the brief of appellant where almost the entire evidence is copied is not such a statement under an assignment of error as the rules governing appeals contemplate.

6.—Evidence—Objection—Bill of Exception.

Since 1853 the rule has never been varied that a bill of exception must disclose the objections made to testimony.

7.—Pleading—New Cause of Action.

Where the original petition set up damages to crops from an overflow caused by the faulty construction of defendant's roadbed, and an amended petition was but an amplification of the original petition, a new cause of action is not set up.

Appeal from the District Court of Grimes County. Tried below before Hon. Gordon Boone.

J. W. Terry and *A. H. Culwell,* for appellant.—The evidence showing, as it does, that the injury to plaintiff's premises was occasioned by reason of the large volume of water flowing out of the Brazos River this water could not and can not be classed as surface water, or such water as the railway company was required to anticipate the flow thereof, and so construct its embankments and culverts as to prevent injury to the adjacent land owners therefrom, and the water injuring plaintiff's premises not being surface water, no liability is created by reason of a damage done by the same. Rev. Stats., art. 4436, 3268, sec. 6; St. Louis & S. F. Ry. v. Craigo, 31 S. W. Rep., 209; Booker v. McBride, 40 S. W. Rep., 1032; Austin & N. W. Railway v. Anderson, 79 Texas, 434; Gould on Waters, secs. 263, 264.

It appearing, as it did, that plaintiff's cause of action was barred by limitation at the time the second amended original petition was filed, and the cause of action therein stated not being the same as that stated in the original petition, the court should have sustained appellant's special exception to the same. Phoenix Lumber Co. v. Houston Water Co., 94 Texas, 456; Union Pac. Ry. Co. v. Wyler, 158 U. S., 285; Enc. Pleading and Practice, pp. 556, 569; Meeks v. S. P. Co., 64 Cal., 149; Buntin v. Railway Co., 41 Fed. Rep., 744; Railway Co. v. Boyliss, 62 Texas, 570.

Carr & Scott and *Hutcheson, Campbell & Hutcheson,* for appellee.—It is the imperative duty of all railroads in constructing their roadbed to first construct all necessary culverts or sluiceways as the natural lay of the land may require for the proper drainage thereof, and they owe this duty with reference to all kinds of water, whether overflow, surface or drainage water, and they are liable for any damage resulting from a failure of that duty. Sal. Civ. St., art. 4436; Gulf, C. & S. F. R. R. v. Helsley, 62 Texas, 595; Gulf, C. & S. F. R. R. v. Holliday, 65 Texas, 519; Gulf, C. & S. F. R. R. v. Donahoo, 59 Texas, 129; Gulf, C. & S. F. R. R. v. McGowan, 73 Texas, 362; Texas & P. R. R. v. Barron, 78 Texas, 424; International & G. N. R. R. Co. v. Malone, 1 Texas App. C. C., 234. On measure of damage: Gulf, C. & S. F. R. R. v. Holliday, 65 Texas, 519; Gulf, C. & S. F. R. R. v. McGowan, 73 Texas, 362; Owen v. Missouri Pac. R. R., 4 S. W. Rep., 594.

FLY, ASSOCIATE JUSTICE.—Appellee instituted suit against appellant to recover $5,040.55 for damages to his crops arising by reason of the improper and negligent construction of the roadbed of appellant, which causing the overflowed waters of the Brazos River to accumulate against its embankment and then rush through causing destruction of the crops. A trial by jury resulted in a verdict and judgment for appellee in the sum of $3,000.

The statement of facts consists of the stenographic transcript of the evidence prepared under the provision of the act of the Legislature of 1905. (Gen. Laws, p. 219.) Appellee seeks to strike out the statement of facts for various reasons which will be considered before discussing the matter raised by the assignments of error.

The caption to the transcript of the evidence identifies the case in which it was prepared by style and number and by a statement of the cause in which it was tried, and date of trial, and gives the names of attorneys for each party. Nothing more could be desired to identify the cause under the law of 1905. The certificate need not show a disagreement of counsel before the facts are approved by the judge. Agreement of parties to a statement of facts prepared by a stenographer is not provided for in the law. The certificate of the trial judge showed that the official stenographer prepared the transcript of the evidence at the request of one of the parties and that he approved it, and that was sufficient.

The caption of the act in question names only oral evidence to be taken by the stenographer, and provision is made in the act for the stenographer to take notes of the "oral evidence in every case tried in

said court, together with all objections to the admissibility of testimony, the rulings of the court thereon and all exceptions taken to such rulings." Documentary evidence is not required to be copied into the stenographer's report, but when referred to in the report, the original documentary evidence, sketches, maps, plats or other matters introduced in evidence may be sent up in the original form at the request of either party, by written direction of the court, or transcribed by the clerk with other parts of the record.

There is no contention that the transcript of the evidence does not contain a full and correct report of the oral evidence adduced on the trial, and, although the transcript of the evidence should have been submitted to the appellee, or his counsel, before being approved by the court, we do not think a failure to so submit it would justify striking it from the record, when no reasonable objection can be urged against it. There is no merit in the motion to strike out the transcript of the evidence and it is overruled.

The evidence justifies the conclusion that appellant was guilty of so constructing its roadbed that the overflowing waters from the Brazos River were caused to be collected at a point above its roadbed and when released from confinement rushed across the land of appellee and damaged him in the sum found by the jury. The negligence of appellant consisted in the failure to construct the necessary culverts or sluices as the natural lay of the land required for the necessary drainage thereof.

The contention that article 4436, Revised Statutes, which provides that "in no case shall any railroad company construct a roadbed without first constructing the necessary culverts or sluices, as the natural lay of the land requires for the necessary drainage thereof," does not apply to water overflowing from a stream, but only to surface water. can not be sustained. (Gulf, C. & S. F. Ry. v. Holliday, 65 Texas, 512; Sabine & East Texas Ry. v. Wood, 69 Texas, 679; Gulf, C. & S. F. Ry. v. Pool, 70 Texas, 713.)

In the Holliday case the court said: "Railway companies are required by our statutes, in constructing their roads, to take into consideration the natural lay of the land, and to construct the necessary culverts or sluices for its necessary drainage. That they must use proper care in this respect, so as not to obstruct the waters of ordinary floods, to the damage of adjacent lands, is settled by the decisions of this court." Citing Houston & G. N. Ry. v. Parker, 50 Texas, 342, and Gulf, C. & S. F. Ry. v. Helsley, 62 Texas, 594.

It would be unreasonable to hold that a railway company would be liable for damages resulting from the accumulation of surface water, by the faulty construction of its roadbed, but not for such accumulation of the water from an ordinary overflow of a stream. The duty rested upon appellant to construct its roadbed so as not to interfere with the flow of flood water in an ordinary rise of a stream along or across which its road may run. It should have anticipated the accumulation of flood water from the overflow, and have built its roadbed with sufficient openings to carry off with expedition, the water from all but unprecedented floods. This proposition is too thoroughly settled to require further discussion. It was not pleaded, nor proved that there was an unprece-

dented or extraordinary rise of the Brazos River at the time the damage took place.

The second assignment of error criticises the third paragraph of the charge, the complaint being that it places a more onerous duty on railroads, as to the construction of their roadbed, than is required by statute, and that it called attention to the maximum amount of damages that appellee could recover, by instructing the jury that they should not find a verdict in excess of $5,040.55. The charge did not require the performance of any more than the statutory duty, and the reference to the amount claimed by appellee did not injure appellant, as clearly appears from the fact that the verdict was for a sum over two thousand dollars less than the amount mentioned. The charge was clear in holding appellant liable only for the damages arising from an overflow of water caused by the improper construction of the roadbed.

The third assignment of error which complains of the fifth paragraph of the charge is devoid of merit. That paragraph presents a phase of case under which appellee could not recover and is wholly unobjectionable.

The fourth and fifth assignments of error are not followed by statements, and should not be considered. A reference to another part of the brief where almost the entire evidence is copied is not the statement contemplated by the rules. It may be said, however, that there is no merit in the assignments. The twenty-two bales of cotton, the value of which appellant insists should be deducted from the amount of the judgment, were raised on land which was not overflowed and for which no damages were claimed.

The sixth assignment presents as error the action of the court in excluding the opinion of J. C. Christie, a civil engineer, who had taken the levels of the ground north and south of the railroad and knew the height of the flood, as to whether the water would have flooded the land if the railroad had not been where it was. It is sufficient to say that the bill of exceptions does not disclose the objections made to the testimony and can not, therefore, be considered. This rule was laid down in Hagerty v. Scott, 10 Texas, 525, in 1853, and has never been varied. (Franklin v. Tiernan, 62 Texas, 92; Galveston, H. & S. A. Ry. v. Gage, 63 Texas, 568; Arambula v. Sullivan, 80 Texas, 615; Ingenhuett v. Hunt, 15 Texas Civ. App., 248.)

The seventh assignment can not be sustained, if for no other reason, because it is not followed by a proper statement. The terms of the original petition are stated, but it is impossible to pass upon whether the second amended petition alleged a new cause of action or not, without a statement of what was set up in the last named pleading. It may be stated, however, that the amended pleadings do not present a new cause of action. The first petition set up damages to crops from an overflow created by the faulty construction of appellant's roadbed, and so does the second amended petition upon which the cause was tried. The last was but an amplification of the first. The judgment is affirmed.

Affirmed.

Writ of error refused.

MAYFIELD GROCER COMPANY v. ANDREW PRICE & COMPANY ET AL.

Decided June 6, 1906.

1.—Note—Endorsement—How Questioned.

The genuineness or sufficiency of an endorsement as a transfer of a promissory note can not be questioned under our statute except by sworn pleading.

2.—Purchaser of Note after Maturity—Pleading.

But where the owner of a note, or one who claims an equity therein alleges and seeks to prove that the holder acquired such note after maturity, and is therefore chargeable with notice of the rights or equities of a prior endorser, such pleading need not be sworn to.

3.—Same—Terms of Endorsement.

Past due commercial paper is degraded to the rank of a personal chattel, and the purchaser acquires only such title as the seller had. This rule does not apply, however, when the endorsement is in such language and terms as evidence ownership of the note in the person to whom it is transferred.

Appeal from the District Court of Anderson County. Tried below before Hon. B. H. Gardner.

Fitzgerald & Butler, for appellant.—Plaintiff having filed the suit as the endorsee of written instrument, and the endorser, Diggs, having filed no plea under oath, the introduction of the notes in evidence bearing the indorsement of said Diggs, "fully proved" that title had passed from her, and entitled plaintiff to judgment against Price for the full amount of the notes and against Diggs for the full proceeds of the land; and this even though the court had admitted evidence seeking to limit the effect of the endorsement, for there being no plea under oath the evidence without valid plea, could not support the judgment. Art. 271, Rev. Stats., or art. 313, Sayles' Stat.; Grounds v. Sloan, 73 Texas, 662; Schauer & Company v. Beitel's Executor, 92 Texas, 601; Parker v. American Exchange Bank, 27 S. W. Rep., 1073.

Diggs having endorsed the notes in blank and delivered them to Davis, and thereby clothed him with all the indicia of ownership, and he having endorsed them in blank and left them with James Owens & Company, and they having endorsed them in blank to plaintiff, who advanced property on the faith of the Diggs endorsement, she is now estopped to assert title to the notes as against plaintiff, and is likewise estopped from saying that her blank endorsement had an entirely different meaning from that which the law writes into every blank endorsement. Kempner v. Huddleston, 90 Texas, 182; Riley v. Reifert, 32 S. W. Rep., 185; 11 Am. and Eng. Ency. of Law (2d ed.), p. 422; Bigelow on Estoppels, p. 547.

J. E. Synnott and *Weeks & Whitley,* for appellee M. A. Diggs.—Plaintiffs having purchased the three notes after their maturity, endorsed in blank, took the same subject to any defenses and all objections effecting them in the hands of the party who first became wrongfully possessed of them, or in other words, appellants got no better title to the notes than Jno. A. Davis had.

This being true the court did not err in rendering judgment for Mrs.

Diggs against Price. Weathered v. Smith, 9 Texas, 623; Walker v. Wilson, 79 Texas, 185; 1 Daniel Neg. Inst., sec. 724; Foley v. Smith, 6 Wall., 492; Tiedeman on Com. Paper., sec. 297.

JAMES, CHIEF JUSTICE.—Appellant brought suit on five vendor's lien notes executed by Andrew Price to M. A. Diggs, and endorsed in blank by M. A. Diggs, also by John A. Davis, and also by James Owens & Company. The last named had endorsed and delivered the notes to the Mayfield Grocer Company as collateral, there being due by it to appellant more than the face of the notes. Price and all the endorsers were sued for the amount of the notes and foreclosure on the land was prayed for.

The only issue that developed was between Mrs. M. A. Diggs and plaintiffs. She pleaded that she sold the land to Price and took these notes, that she had endorsed and delivered them to Davis for collection only, that she had never authorized Davis to sell or in any way dispose of them to James Owens & Company, nor James Owens & Company to sell or hypothecate them, and that she was not aware that plaintiff, or James Owens & Company or Davis claimed title to or ownership of same until she was cited in this suit, and she prayed for judgment for possession of said notes, and, as Price was sued, she prayed that she be given judgment against him and the Mayfield Grocer Company for the amount thereof and for foreclosure of her vendor's lien on the land, etc.

The evidence disclosed that she had endorsed the notes in blank and delivered them to Davis, a relative, for the purpose of collecting them for her. That Davis, who was a member of the firm of James Owens & Company, endorsed them in blank, and that James Owens & Company in turn endorsed them in blank and delivered them to plaintiff as aforesaid. Three of the notes were past due when plaintiff took them.

The court gave judgment in favor of plaintiff and Mrs. Diggs against Price for the debt and for foreclosure of the lien, directing that three-fifths of the net proceeds of the foreclosure sale be paid to Mrs. Diggs and two-fifths to plaintiffs. The Mayfield Grocer Company appeals claiming:

1st. That the endorser, Mrs. Diggs, having filed no pleading under oath, the introduction of the notes bearing her endorsement fully proved that title had passed from her and entitled plaintiff to judgment against Price and her for all the proceeds of the land, and this though the court had admitted evidence tending to limit the effect of her endorsement, for there being no plea under oath the evidence without such plea could not support the judgment.

2d. She having endorsed the notes in blank and delivered them to Davis, and thereby clothed him with all the indicia of ownership, and he having endorsed them in blank and left them with James Owens & Company, and they having endorsed them in blank to plaintiff, is estopped from saying that her blank endorsement had an entirely different effect from that which the law attaches to every blank endorsement.

Appellant bases the first proposition upon what was held in Schauer v. Beitel, 92 Texas, 601, and Grounds v. Sloan, 73 Texas, 662. Those cases hold that the genuineness or the sufficiency of an endorsement as

a transfer of the paper can not be questioned under our statute except by sworn pleading. Applying the rule there declared, to the circumstances of this case, there being no pleading under oath, the effect of the endorsement was to establish the assignment and delivery of the notes to plaintiff. But the effort here is not an attempt to negative the assignment and delivery of the notes to plaintiff, but assumes such assignment and delivery, and undertakes to show that they took place under such circumstances as charged plaintiffs with the equities or rights of a prior endorser. It admits that plaintiff holds the notes by transfer, but claims that in its hands the notes are subject to defendant's equity. We know of no statute that requires such matter to be pleaded under oath.

The rule affecting ordinary commercial paper is as stated in Walker v. Wilson, 79 Texas, 188, that "the transferee of overdue commercial paper gets no better title than that of his transferrer. The holder of such paper for value before maturity takes it discharged of every defense against it, but when dishonored it is in respect to the title acquired by a subsequent holder, degraded to the rank of a personal chattel, the purchaser of which acquires only such title as the seller had."

We see no escape from the conclusion that as to the notes that were past due when taken by plaintiff, they were in plaintiff's hands subject to the right or equity Mrs. Diggs had in respect to them while in the hands of Davis or James Owens & Company.

The case above cited was approved in Kempner v. Huddleston, 90 Texas, 185, where a different rule was held to be applicable when the endorsement is in such language and terms as evidence ownership of the notes in the person to whom they are transferred, in which case the transferrer would not be allowed to dispute this as against a subsequent purchaser who had acted upon such theory. The judgment is affirmed.

Affirmed.

Writ of error refused.

F. W. A. FISCHER v. D. C. GIDDINGS.

Decided June 7, 1906.

1.—Fact of Death—Proof—Letters of Administration.

An order of the court probating a will and appointing an executor or administrator is prima facie evidence of the facts authorizing such order, including the death of the decedent.

2.—Limitation.

Facts discussed and held insufficient to show title by limitation under the ten years' statute.

Appeal from the District Court of Hardin County. Tried below before Hon. L. B. Hightower.

B. L. Aycock, for appellant.—That the proceedings in the Probate Court were not sufficient evidence of the death of the testator, cited, English v. Murray, 13 Texas, 366; Turner v. Sealock, 54 S. W. Rep., 359.

W. W. Searcy, for appellee.

PLEASANTS, ASSOCIATE JUSTICE.—This is an action of trespass to try title. The suit was originally brought by D. C. Giddings, Sr., against appellant to recover the D. C. Giddings survey of 524 acres of land in Hardin County. After the institution of the suit D. C. Giddings, Sr., died and his son, D. C. Giddings, Jr., who is independent executor and trustee under his father's will, with leave of the court made himself a party plaintiff and prosecuted the suit to judgment.

The defendant disclaimed as to all of the land except 160 acres described in his answer by metes and bounds, as to which he pleaded not guilty and limitation of ten years.

The trial in the court below by a jury resulted in a verdict and judgment in favor of plaintiff for all of the land, such verdict having been returned under peremptory instructions of the court.

The land described in plaintiff's petition was patented by the State of Texas to D. C. Giddings, the testator of appellee, on December 5, 1883. Plaintiff introduced in evidence the will of D. C. Giddings executed December 30, 1901, and the order of the County Court of Washington County admitting the will to probate. By the terms of this will appellee was devised a one-third interest in the estate of the testator and appointed independent executor and trustee for the other devisees. The order admitting the will to probate appoints appellee independent executor and he has duly qualified as such.

We refer to the opinion of this and the Supreme Court on a former appeal (74 S. W. Rep., 85, and 77 S. W. Rep., 209) for a description and plat of the land in controversy.

The 160 acres claimed by appellant is described in his answer as follows:

"160 acres in the said Hardin County, being a part of the lands and tenements claimed in plaintiff's said petition, and known as the Philip Cotton homestead, and being that part of the same bounded on the east by the S. Laird survey 536 varas, and between parallel lines westwardly sd. lines being the N. line of the B. Mancha and the S. lines of the section numbered 374 and the Q. Shaw survey and 110 vrs. E. line of the Shaw sur. Beginning at the intersection of sd. B. Mancha and the sd. S. Laird; thence N. 536 varas to where the Sec. 374 intersects with the sd. Laird for the N. E. cor. of this 160 acres; thence W. 1,067 varas to the E. line of the sd. Shaw survey; thence S. 110 varas to S. E. cor. of sd. Shaw survey; thence W. with Shaw's S. line 780 vrs. a point in sd. line from which a line drawn south to the north line of Burk survey, will include the sd. 160 acres."

The evidence shows that J. J. McAdams built a small house on the land in 1875 and lived there for a year or more. He moved off and sold his claim to Philip Cotton for $10. He testified that prior to his removal from the land he paid $5.00 for filing on it and supposed it was filed on in his name; that the land was supposed to be vacant land and he did not settle on it intending to claim it by limitation.

N. S. Jordan testified for the defendant as follows: "I know the land in controversy; I moved in that neighborhood in 1889 from Kountze and lived there about two years and moved from there to Sour Lake in

1899, and then moved back there on the Q. Shaw survey. That land is the same land known as the Philip Cotton homestead and is known in that neighborhood as Phillip Cotton homestead. I moved my family there in June and went down there. I had a logging contract with the Reliance Lumber Company to put in logs. Alex Fountain was in the contract with me; that is A. S. Fountain. Alex Fountain moved on this land in July or August, 1889, and lived there about four years I think. At the end of that time Tobe McKinney took possession of the land. Tobe McKinney held the land for A. S. Fountain, stayed there to take care of Fountain's house. I think Tobe McKinney moved away from there in the spring of 1900 or latter part of 1899. Fountain bought the land and the improvements from Dr. Woodward. He set up the claim to 160 acres and asked me to go in with him and I refused to do so. After Tobe McKinney, Mr. F. W. A. Fischer took possession of the land. He is the defendant in this case. I am acquainted with him. F. W. A. Fischer stayed with Tobe McKinney the last year that Tobe was there and has been there ever since, and is there now."

He further testified on cross examination that he and Fountain bought the improvements on the land from Dr. Woodward in 1889, but they did not buy the land; that afterwards Fountain wanted to claim the land and told him it was vacant and that they could get deeds to it; that Fountain concluded it was vacant land immediately after they went on it, and he went to work to get a title. He refused to go in with Fountain to work up a title to the land because he did not think the land was worth it. On November 25, 1891, Fountain purchased the 160 acre tract from William D. Laird, and on June 3, 1898, conveyed it to appellant.

The land has been occupied by appellant since he purchased it in 1898 and he has paid the taxes that have accrued thereon since that time. He also paid several years back taxes which accrued prior to his purchase. This suit was brought June 14, 1901.

Appellant assails the judgment of the trial court: First, on the ground that the evidence fails to show title in plaintiff in that there is no evidence in the record showing the death of D. C. Giddings, under whom appellee claims; and second, because the evidence shows that the defendant has title under the ten years statute of limitation.

We think neither of the objections to the judgment are valid. In the case of English v. Murray, 13 Texas, 366, it was held "that letters of administration can not be collaterally offered to establish the death of the supposed deceased, or, where the death is admitted, to prove the time of his death." The same rule was announced and applied by this court in the case of Turner v. Sealock, 54 S. W. Rep., 358. In both of these cases proof of the fact and date of the death of the alleged deceased was essential to the establishment of the defense pleaded in the one, and the cause of action alleged in the other, and the question of the right of an executor or administrator to maintain a suit brought by him to recover property of the estate without showing the death of the decedent by evidence aliunde the order granting the application for probate or administration and granting letters was not passed on in either case.

We are of opinion that the rule quoted does not apply in suits brought by an executor or administrator. The Probate Court is only authorized

to appoint an executor or administrator upon proof of the death of the person upon whose estate administration is granted, and the order of the court probating a will and appointing an executor or administrator is at least *prima facie* evidence of the existence of the facts authorizing such order; and the right of the person so appointed to maintain a suit for the recovery of property belonging to the estate of the alleged decedent can only be questioned under a plea in abatement.

The evidence before set out fails to show adverse possession of the land in controversy for ten years prior to the institution of this suit, and for that reason the trial court did not err in instructing the jury to return a verdict in favor of the plaintiff.

It is true that Fountain, under whom appellant claims, went into possession in 1889, but he only bought the improvements at that time and is not shown to have set up any claim to the land prior to November, 1891, when he purchased it from Laird, and this was less than ten years before this suit was filed.

Jordan, the witness upon whom defendant relies to show adverse possession in Fountain, does not say when the adverse claim began, but it is shown by his testimony that Fountain thought the land was vacant when he went on it and declared his intention of obtaining a title, through deeds from its former possessors, and there is no evidence showing any intention on the part of Fountain to acquire title by limitation, or indicating that he was holding adversely to the owner prior to the date of his purchase from Laird. The burden was upon the defendant to establish his claim of title by limitation, and having failed to show an adverse claim for ten years prior to the filing of this suit, the trial court properly instructed a verdict for plaintiff.

We are of opinion that the judgment of the court below should be affirmed and it has been so ordered.

Affirmed.

Writ of error refused.

H. C. FERGUSON ET AL. v. J. A. MORRISON ET AL.

Decided June 9, 1906.

1.—Admission of Evidence—No Exception.

Where it does not appear that a bill of exception was taken to the admission of evidence, an assignment of error based thereon will not be considered.

2.—Assignment of Error—No Statement.

An assignment of error that the court erred in its charge because contrary to the undisputed evidence, will not be considered when there is no statement of the evidence.

3.—Same—Misquoting the Record.

An assignment of error which misquotes the record will not be considered.

4.—Charge—Emphasizing Issue.

A charge that the burden was on the plaintiffs to establish by a preponderance of the evidence an issue alleged by them, did not unduly emphasize such issue.

Appeal from the District Court of Denton County. Tried below before Hon. D. E. Barrett.

H. C. Ferguson and *S. M. Brady,* for appellants.

Robert Hopkins, John Church, S. H. Hoskins and *J. T. Bottorf,* for appellees.

SPEER, ASSOCIATE JUSTICE.—This suit was brought in the District Court of Denton County by appellees to set aside a judgment of the District Court of that county rendered in 1874 in favor of J. A. Morrison against W. S. Trout, the appellees being for the most part heirs of said Trout, alleging that said judgment devested title out of said Trout and vested it in said Morrison to the survey of land in controversy, when said Trout was dead at the date of the rendition of such judgment. There was a prayer for the possession of the land. The defendants answered by general and special demurrers, plea of not guilty, general denial, special pleas and cross bill. All their demurrers, however, were overruled and there was a trial before a jury which resulted in a verdict and judgment for all the defendants, from which the plaintiffs have appealed.

The first assignment of error, complaining of the admission in evidence of the hearsay statement of James Collins, is not considered because no reference is anywhere made in the brief to a bill of exceptions taken to the admission of such evidence, and indeed, we have failed to find any in the record, although we have searched for it.

The second assignment of error complains that the court erred in the third paragraph of his charge to the effect that if the jury found the deed of W. S. Trout to James Collins to the land sued for, and which was offered in evidence by appellees as an outstanding title in said Collins, was intended as a mortgage, this would not entitle appellants to recover unless they should further find that the debt had been paid, because it was shown "by the undisputed evidence that said Collins did not claim title to said land under this instrument, and that he admitted to the plaintiffs that the land belonged to the heirs of W. S. Trout, maker of said instrument." This assignment, which is submitted as a proposition, is not followed by any statement whatever, and we are therefore unable to say whether the evidence upon this issue is undisputed, as appellants say it is. The assignment is not sufficient under the rules and it is therefore not considered.

The third and fourth assignments of error are grouped. The third complains of a charge which it does not correctly quote, and the fourth insists that by giving the fourth paragraph of his charge, to the effect that the burden is on the plaintiffs to show by a preponderance of the evidence that the conveyance from Trout to Collins was intended as a mortgage, the court unduly emphasized that issue in the case. But after carefully reading the entire charge, we are constrained to hold otherwise. There is no assignment of error requiring us to consider the correctness of the proposition of law involved and we do not pass upon it, but we do not think the charge is on the weight of the evidence by unduly emphasizing any feature of the case.

Finding no error in the judgment, we order that it be affirmed.

Affirmed.

JAKE PEARCE, GUARDIAN, v. SWEET LEITCH.

Decided June 9, 1906.

Appeal from Probate Order—Proceeding in rem—Conclusive.

From an order of the County Court setting aside a homestead to the surviving widow the administrator of the estate appealed to the District Court where the same order was made. Afterwards, in his capacity as guardian of the minors, he sued out a writ of certiorari for the purpose of having the same order reviewed by the District Court. Held, there is no authority for such second review of a probate proceeding. The proceeding to set aside the homestead was a proceeding in rem and the judgment of the District Court on appeal was conclusive upon all persons interested in the estate.

Appeal from the District Court of Hood County. Tried below before Hon. W. J. Oxford.

Jno. J. Hiner and *H. D. Payne,* for appellant.

Estes & Douglass, for appellee.

STEPHENS, ASSOCIATE JUSTICE.—This is an appeal from a judgment of the District Court rendered October 25, 1905, setting aside a homestead to Sweet Leitch, the surviving widow of D. L. Leitch, deceased, the proceeding of the County Court where the original order was made December 23, 1904, setting aside to her the homestead, having been taken to the District Court by writ of certiorari at the instance of appellant, as guardian of the minor children of D. L. Leitch, after he had prosecuted an unsuccessful appeal from said order as adminstrator of the estate of said D. L. Leitch.

We know of no authority or precedent for such second review of a probate proceeding. The minors represented by appellant as guardian in the certiorari proceeding, although they had no guardian when the order was entered in the County Court setting aside the homestead and when on appeal to the District Court a like order was made, were nevertheless bound as distributees of the estate in course of administration by the judgment rendered on appeal and could not, through a guardian subsequently appointed, have another adjudication of the same matter by means of a writ of certiorari. A probate order may be brought before the District Court either by appeal, at the instance of any person who may consider himself aggrieved by it, as provided in article 2255 of the Revised Statutes, or by certiorari, at the instance of any person interested in the estate, as provided in article 332 of the Revised Statutes, or possibly by both methods; but when the matter has once been tried *de novo* and disposed of in either proceeding the litigation in that court is at an end. Especially is this the case in a proceeding to set aside a homestead, since it is a proceeding *in rem,* which answers the contention of appellant that the minors were not parties to the appeal taken by the administrator and therefore not bound by the decree rendered therein. Any other construction of the articles of the statute above cited would lead to endless litigation. It could not have been the purpose of the lawmakers, in providing for the administration of estates of deceased

persons, to allow any person considering himself aggrieved by an order of the Probate Court to have a trial *de novo* on appeal, and at the same time allow every other person interested in the estate to have the same matter again tried *de novo* on writ of certiorari.

The error of the court in proceeding to try the issue again, notwithstanding the judgment previously rendered on appeal, which was urged in bar of the proceeding, was not one, however, of which appellant can be heard to complain; but inasmuch as the court undertook by this judgment to deprive the surviving widow of a part of the annual income of the homestead, to that extent altering the original judgment, of which complaint is made by cross assignments, we have concluded to reverse the entire judgment and dismiss the certiorari proceeding.

Reversed and dismissed.

Writ of error refused.

Texas and Pacific Railway Company v. J. Y. Stewart.

Decided June 9, 1906.

1.—Pleading—Special Damage—Charge.

Where the plaintiff sought by his pleading to recover only special damages caused by the negligence of the carrier in delaying the transportation of live stock whereby plaintiff was prevented from complying with a contract theretofore made by him, it was error for the court to submit to the jury an issue as to depreciation in the market value of the stock by reason of delay in the transportation.

2.—Opinion Testimony, When Admissible.

The question being whether or not the shipment of stock in question compared favorably with a previous shipment, it was not error to permit the plaintiff to tesify as to his opinion on the matter, since such fact is altogether a question of opinion evidence.

3.—Cause of Injury—Pleading.

A general allegation of rough handling would not admit proof of injury to stock caused by a defective car.

4.—Contract of Shipment—Negligent Delay.

Because a contract of shipment did not bind the carrier to deliver the shipment at any particular time, the plaintiff was not thereby prevented from proving, under proper pleading, that the carrier was guilty of negligent delay in transporting the shipment.

Appeal from the County Court of Mitchell County. Tried below before Hon. W. B. Crockett.

Ed. W. Smith, for appellant.

F. G. Thurmond and *Royall G. Smith,* for appellee.

SPEER, Associate Justice.—This is the second appeal in this case and an examination of the opinion on the first appeal, reported in 12 Texas Ct. Rep., 725, will disclose the nature of the case. We must again reverse the judgment of the trial court for errors in his charge. The

eighth paragraph of the court's charge in part reads: "Therefore you are charged that if under the preceding paragraphs of this charge you have found defendant not liable for the inability, if any, of the plaintiff to fill the Pinkerton and the Dees contracts, that the measure of damages in this case is the difference, if any, in the market value of said horses at their destination, delivered at the time and in the condition in which they were, and their market value at their destination delivered at the time and in the condition in which they should have been." This is construed by both parties, and properly so we think, to mean that the measure of appellee's damages would be as indicated in the event the jury found that appellant was not liable for the loss of either the Pinkerton or the Dees contract. This is erroneous for the reason that appellee sought only to recover the special damages incident to a loss of the sales under these contracts, and nowhere made a case entitled him to recover for depreciation in the market value of his horses. Indeed, it is nowhere alleged that the contract price of $27.50 per head at Mineola, or $20 per head at Texarkana, represented the market value of the animals at those places if delivered with proper care, or that they would have had a market value at all. For aught that appears from the pleadings, these contracts of sale may have been very advantageous ones, exceeding the real market value of appellee's animals, and indeed, he may have actually realized their full market value when they were finally sold. Since appellee alleged no other loss than that of the sales under the Pinkerton and Dees contracts, he should not have been permitted to recover any other.

It is insisted by appellant that notice to the foreman of its stockyards at Fort Worth of the sale to Dees prior to the shipment of the stock from Fort Worth to Texarkana, would not be binding upon it, since such agent had no authority in the premises. But upon another trial the extent of this agent's authority may be shown, and this question thus eliminated.

It seems that appellee's sale of the horses to Pinkerton at Mineola was conditioned upon their comparing favorably with a previous shipment, and on the trial he was permitted to testify that they did. It is true that this involved a conclusion or opinion of the witness, but that is no valid objection to the testimony, since such fact is altogether a question of opinion evidence. No point is made that the witness was not qualified to give his opinion upon the subject.

Upon another trial, if appellee desires to prove that the car in which his horses were shipped was defective and resulted in injury to them, he should amplify his pleadings. It can hardly be said that a general allegation of rough handling would be sufficient to admit proof of a defective car. We can not see, however, that proof of such fact would be at all relevant to any issue under the pleadings as they now stand, since undeniably the injured condition of the horses had nothing to do with the loss of either sale.

Appellee's testimony to the effect that appellant's delays caused him to miss the sale to Pinkerton at Mineola was not contradictory of the written contract of shipment stipulating that the stock were not to be transported within any specified time, nor to be delivered at any particular day, nor in season for any particular market, because he alleged, and the evidence tended to show, that he would have reached Mineola

in time to have consummated the sale to Pinkerton but for the negligence of appellant.

In view of another trial we suggest that appellant's sixth assignment of error raises a point that should be observed in the charge. If the contract price under the Dees contract was $20 per head and freight, and the jury should find that appellant was liable for the loss of the Pinkerton sale only, then the measure of damages would be, as we indicated in the former opinion and as charged by the court, the difference between the contract price of the horses at Mineola, and the sum brought at Fort Worth—$20 per head and freight.

For the error in the court's charge the judgment is reversed and the cause remanded.

Reversed and remanded.

SAN JACINTO OIL COMPANY ET AL. v. J. J. CULBERSON ET AL., INTERVENORS.

Decided June 9, 1906.

1.—Report of Master in Chancery, When Conclusive.

In the appointment of a master in chancery in a receivership suit the master was directed to ascertain and report to the court the nature, validity and amounts of all claims against the defendant company and to report his conclusions of law and fact upon all interventions in said suit; it was further ordered that said master in chancery should file his reports from time to time and that any party interested in the suit should be heard upon exceptions to the same, provided such exceptions were made before the master in chancery upon the rendition by him of his conclusions in the premises, and upon failure to make exception to said report at said time then the report of the master should stand confirmed. The master thereafter heard the claims of several intervenors and filed his report thereon in court. No exception was taken by the defendant company before the master to his findings; but on the same day on which his report was filed said company filed in court numerous exceptions to the same. Held, the report of the master in chancery should have been approved as conclusive of the issues, and it was error to submit to a jury the issues raised by said exceptions.

2.—Same—Right of Trial by Jury.

While it is true that under our laws a party litigant is entitled to a trial by jury in all cases of equitable as well as legal cognizance, still this right will be considered as waived unless seasonably exercised.

3.—Same—Same—Practice.

The proper practice would have been for a party complaining of a master's report to have presented his objections to the master, to the end that he might correct his findings, and if he failed to do so, then to have the master certify along with his report the evidence upon which his contested conclusions of fact were found, so that the court might review the findings.

Appeal from the District Court of Tarrant County. Tried below before Hon. Mike E. Smith.

Capps & Cantey and *A. B. Flanary,* for appellants.—The court erred in permitting the intervenors to introduce in evidence the report of the master for that such testimony was improper and irrelevant, the same

having been excepted to by defendant, and is not such evidence as contemplated by the statute, and that the case at bar was not such a case as authorized the introduction of the master's report for any purpose whatever, and that such report is hearsay in its nature, and is an expression on the part of a third party, and tended to deprive the defendant of the constitutional right of trial by jury, and further for that the facts stated in such report are not in conformity with the allegations of the intervenors' pleadings, and especially as to that part of the same making a finding with reference to the coal purchased by the intervenors, for that there is no pleading to justify any such finding, and no allegations in the petition of the intervenors raising an issue as to any such measure of damages; and the court further erred in overruling defendant's motion for a new trial based on this error. Rev. Stats., arts. 1485, 1494; Barkley v. Tarrant County, 53 Texas, 251; Kendall v. Hackworth, 66 Texas, 506; Moore v. Waco Building Association, 9 Texas Civ. App., 407.

The report of the master being excepted to did not shift the burden of proof from the intervenors to the defendants. Art. 1496, Sayles' Rev. Stats.; Hills v. Dons, 37 S. W. Rep., 638; Hempner v. Galveston County, 76 Texas, 216; Whitehead v. Perie, 15 Texas, 7; Dwyer v. Kalteyer, 68 Texas, 559; Clark v. Hill, 67 Texas, 148; Beaumont Pasture Co. v. Preston, 65 Texas, 451; Eagle Mfg. Co. v. Hanaway, 90 Texas, 581.

A. M. Carter, for appellees.—The failure of the San Jacinto Oil Company and George W. Armstrong to except to the master's report, as provided for by the order appointing the said master, deprived them of the right under said order to any hearing upon the exceptions to the same filed only in the clerk's office, and upon filing such report by the master, the same stood confirmed by reason of the said order as aforesaid. Rev. Stats., arts. 1485, 1903; Henderson's Chancery Practice, secs. 413, 414, 417, 418, 471, 472, 470, 477, 478, 479, 480, 441, 482, 483-495, 362-380; 16 Cyc., p. 444-D et seq.

The appellant did not except before the master and bring up the evidence heard before him with said exceptions, and therefore the court below had nothing before it by which it could ascertain whether or not the said master had erred in any conclusions of fact that he arrived at. 16 Cyc., pp. 451 and 452.

CONNER, CHIEF JUSTICE.—The judgment appealed from in this case is one in accord with a report of the master in chancery in the receivership proceedings against the appellant oil company. It appears that on January 16, 1903, at the instance of a complaining creditor, the District Court of Tarrant County for the Seventeenth Judicial District appointed a receiver to take charge of all property and assets of the San Jacinto Oil Company. Neither the regularity nor validity of the appointment of the receiver is questioned, and hence it needs no further notice. On the 7th day of March thereafter, said court also duly appointed a master in chancery, who was directed, among other things, to ascertain and report to the court the nature, validity, and amount of all debts, claims and demands against the oil company, of which it appears there

is a large number, and to investigate and report his conclusions of law and fact upon all pleas, motions or interventions then on file or that might thereafter be filed in the receivership cause. The master was required to give due notice of the time and place of his hearings and was given power to compel the production of evidence. The order of reference contains the following further special provision, namely: "It is further ordered and decreed that said master in chancery shall file his report herein from time to time as he may complete the same and that any party or parties interested in this suit, may and shall be heard upon exceptions to the same, provided that such exceptions shall have been made before the master in chancery upon the rendition by him of his conclusions in the premises covered by his report, and upon the failure of any or all of the parties interested in any of the matters pending before said master to take exceptions to his conclusions or report before him, then upon the filing of any such report by the master the same shall stand confirmed."

On April 24, 1903, appellees J. J. Culberson, the Paris Oil and Cotton Company, the West Cotton Oil Company, the Ladonia Cotton Oil Company, the Celeste Cotton Oil Company, the Waxahachie Cotton Oil Company, the Decatur Cotton Oil Company, the Corsicana Cotton Oil Company, the Rosebud Cotton Oil Company, and the Shreveport Cotton Oil Company, by leave of court granted, intervened in the receivership cause and alleged the execution of a contract with the appellant oil company by the terms of which it agreed to furnish the appellee cotton oil companies all the crude oil in tank car lots necessary for their use as fuel for the term of one year beginning June 26, 1902, at ten cents per barrel of forty-two gallons each. The contract, as exhibited in the petition for intervention, was voidable by acts of God, accidents to oil wells, failure of oil wells, or governmental interference. Intervenors charged that the contract had been breached by an entire failure and refusal of the San Jacinto Oil Company to supply crude oil, and damages were laid in the sum of fifty-two thousand dollars for each of the intervening companies.

The record fails to disclose the time or circumstances of the hearing before the master in chancery, but it does appear from his report, filed in the court on August 12, 1904, that he did, without objection, hear appellees' plea of intervention upon an answer of the San Jacinto Oil Company excusing its non-performance of the intervenors' contract on the ground of a failure of its oil wells to furnish sufficient oil to supply the requirements of the contract. The master found and reported in favor of intervenors. He found as matter of fact, without certifying, however, the evidence upon which his findings were based, among other things, the execution and breach of the contract as alleged, and reported that, "From the foregoing findings of fact I concluded that said intervenors are entitled to have judgment severally against defendant as follows: Paris Cotton Oil Company, $1,772.01; Waxahachie Cotton Oil Company, $2,719.53; Rosebud Cotton Oil Company, $1,680; Celeste Cotton Oil Company, $278.55; Ladonia Cotton Oil Company, $607.20; Shreveport Cotton Oil Company, $2,530.20. I find that the other intervenors, namely, West Cotton Oil Company, Corsicana Cotton Oil Company, and the Decatur Cotton Oil Company are not entitled to recover

any sum, there being no testimony introduced by them in support of their intervention."

No exception or objection before the master appears to have been made to his said findings, but on the same day his report was filed in the court appellants also filed with the clerk of the court numerous objections contesting substantially all of the master's conclusions. No further action appears to have been taken until March 23, 1905, when there was a trial before a jury which returned a verdict for appellees and upon which the judgment was rendered, as stated in the beginning.

The errors assigned all relate to the proceedings on the trial before the jury, and while we incline to the opinion that the court erroneously admitted the master's report in evidence and erred in instructing the jury that the burden was upon appellants to disprove it, we nevertheless conclude that all such errors are harmless, on the ground that no other final result could have been properly reached. The original error of the court was in failing to approve the master's report after it was filed, and in submitting the cause to the jury at all. The correct practice in such cases does not seem to be very well crystallized in our own adjudicated cases, nor can it be said to be entirely uniform in the courts of other States. But article 1485, Revised Statutes, in every case of the appointment of a receiver, requires the appointment of a master in chancery "who shall perform all of the duties required of him by the court, and shall be under orders of the court, and have such power as a master in chancery has in a court of equity." Further, article 1493, Revised Statutes, provides that, "In all matters relating to the appointment of receivers, and to their powers, duties, and liabilities, and to the powers of the court in relation thereto, the rules of equity shall govern whenever the same are not inconsistent with the provisions of this chapter and the general laws of the State." We find no other statute of controlling effect and hence are relegated to the general rules of equity for the proper practice.

Under our law it is doubtless true that a party litigant is entitled to a trial by jury in all cases of equitable as well as of legal cognizance. This right, however, must be seasonably applied for. It would be an unreasonable extension of the right to hold that a party whose cause, as here, was without objection, referred to a master in chancery for findings, and who appears before such master and contests the issues joined, could thereafter demand a trial *de novo* before a jury merely because he is dissatisfied with the master's conclusions. (Freeland v. Wright, 28 N. E. Rep. (Mass.), 678; Henderson's Chancery Practice, art. 424.) The author cited, in the second paragraph of the section referred to, says: "The right to ask that an issue, or issues, of fact be made by the chancellor and submitted to a jury for determination is one that may be waived, and is treated as waived unless seasonably asserted; and it is now settled that, after the whole cause has been referred to a master and his report has been filed, it is too late to insist upon a trial by jury as of right. The application should be made before the cause is referred, because a trial of all the issues of fact is inconsistent with a trial by jury. Questions of fact in equity are tried by the court in the first instance; or by a master, and, upon exceptions to his report, by the court, or upon issues submitted to a jury. They are in no given case, however,

tried but in one mode, except where, on coming in of the master's report, the finding appears unsatisfactory, and the nature of the evidence disclosed presents a case which the court in its discretion ought to hear or send to a jury. A party who has had his day in court has no right to complain of the court for refusing to allow him to subject the other party to further delay and expense by appeal from a master to a jury. It would be unreasonable to permit a party to go to trial before a master and take his chances of a favorable report, and then, dissatisfied with the result, have another trial before a jury and thereby put the other party to unnecessary expense and trouble." While as indicated in the above quotation, and as plainly stated in other parts of the section from which it is taken, it is under certain circumstances within the court's discretion to order an issue to be submitted to a jury, even after the coming in of the master's report, but it is said that "this course should never be pursued except good reason appears therefor," and nothing in the record before us, in our opinion, shows that this controversy comes within any exception to the general rule, or was referred to a jury in the exercise of the court's discretion.

The proper practice, as applied to the facts of this case, was for appellants to have presented their objections to the master to the end that he might have opportunity to correct his findings, and in event of his failure to do so, then to have the master certify along with his report the evidence upon which his contested conclusions of fact were founded, so that the court could review the findings. By the great weight of the authorities, in the absence of exceptions before the master, and in the absence of the evidence upon which his conclusions of fact are based, the court as a general rule will only review such errors as are apparent on the face of the master's report. See Fletcher's Equity Pleading & Practice, articles 601 and 607; 16 Cyc., pages 446 and 448; 19 Cent. Dig. C. C., 1478 and 1486, and authorities cited. In our judgment the authorities referred to, as well as the order of reference hereinbefore quoted, requires the conclusion, under the circumstances of this case, that the report of the master in chancery is conclusive and the court below should have approved it without referring the issues to the jury. The verdict and judgment, however, being to the same effect as the master's report, the judgment will be affirmed.

Affirmed.

Writ of error granted.

T. H. WALLER v. N. A. GRAY ET UX.

Decided June 9, 1906.

1.—Jurisdiction—Money Demand—County Court.

A suit was brought in the District Court upon an unliquidated demand for $1,500; afterwards by amended petition the claim was reduced to $500. Held, the District Court had no jurisdiction to try the case after the amendment was filed.

2.—Same—Legislative Act—Restoring Jurisdiction.

By an Act of the Legislature, which took effect July 14, 1905, the general jurisdiction of a County Court in civil and criminal matters was restored; in

a suit for damages then pending in the District Court of the same county an amended petition was filed on August 7, 1905, reducing the claim for $1,500 to $500. Held, upon the filing of the amended petition the District Court should have transferred the case to the County Court.

ON REHEARING.

3.—Interest as Damages—Jurisdiction.

In a suit for $500 damages and interest thereon, the interest being claimed as part of the damages to which plaintiff is entitled in addition to the amount named as damages, the District Court would have jurisdiction.

4.—Boundaries—Fraud—Discovery—Limitation.

The failure on the part of a vendee of land to have the same surveyed and thus determine whether or not the boundaries pointed out by his vendor are correct, is not necessarily negligence, and in the absence of negligence limitation will not begin to run until the fraud is actually discovered.

5.—Same—Case Distinguished.

In the case of Bass v. James, 83 Texas, 110, the trial court held as a matter of fact upon the evidence before it, that the purchaser of the land in that case, by the exercise of reasonable diligence, could have sooner discovered the falsity of the representations relied on. In the case at bar the question is as to the sufficiency of plaintiff's pleading, and there is nothing on the face of the pleading which requires a holding that plaintiff was guilty of negligence in not having the land surveyed.

Appeal from the District Court of Roberts County. Tried below before Hon. B. M. Baker.

Willis & Willis, for appellant.—The two years' statute of limitation does not apply to the appellant's original petition, and the court erred in sustaining a special exception raising said statute. Davis v. Nuzum, 40 N. W. Rep., 497; Alvord v. Waggoner, 29 S. W. Rep., 797; Brown v. Brown, 61 Texas, 49; Guinn v. Ames, 11 Texas Ct. Rep., 71; Bass v. James, 83 Texas, 110.

Coffee & Kelly and *Theodore Mack,* for appellee.—Where plaintiff by amendment reduces the amount sued for below the jurisdiction of the court, jurisdiction is lost, where he refuses to amend. Haddock v. Taylor, 74 Texas, 216; Townsend v. Texas & N. O. Ry., 13 Texas Ct. Rep., 456; Creswell Ranch Co. v. Scoggins, 18 Texas Civ. App., 376.

Although plaintiff's original petition might have claimed damages in an amount within the jurisdiction of the District Court, still where he afterwards amends and sues for exactly $500, and his trial amendment concludes with prayer for judgment "as in his original petition," this concluding prayer is regarded merely as a "flourish of the pleader" and jurisdiction depends upon the amount which the allegation of the petition shows plaintiff is entitled to. In this case the trial amendment clearly showed that plaintiff was claiming exactly the sum of $500. Buer v. Prescott, 14 S. W. Rep., 138.

The County Court and not the District Court has exclusive jurisdiction of a money demand for exactly $500. Gulf, C. & S. F. Ry. Co. v. Rambolt, 67 Texas, 654; Carroll v. Silk, 70 Texas, 23; Betterton v. Echols, 85 Texas, 214; Garrison v. Pacific Express Company, 69 Texas, 345;

Lazarus v. Swafford, 15 Texas Civ. App., 369; Creswell v. Scoggins, 15 Texas Civ. App., 376; Cleaver v. Duke, 93 Texas, 657.

CONNER, CHIEF JUSTICE.—This suit was originally instituted by appellant in the District Court of Gray County to recover of appellees damages in the sum of $1,500, it being alleged in substance that this sum constituted the difference in value between a certain tract of land sold by appellees to appellant as it actually existed and as by them fraudulently represented. By agreement of all parties the venue of the case was thereafter changed to the District Court of Roberts County. In the latter court, on the 7th day of August, 1905, appellant filed an amended petition, it is styled a trial amendment, in which he limited his demand to the sum of $500, the distinct allegation being "that said $500 represented the difference in the value between the said land as it actually existed and as represented by defendant Gray." Appellees move to dismiss the case for want of jurisdiction in the District Court of Roberts County.

As originally presented the District Court of Roberts County undoubtedly had jurisdiction of the case, but it seems equally clear that by the trial amendment appellant deprived himself of the right of being further heard in that court. It is well settled that the County Court and not the District Court has exclusive jurisdiction of a money demand for exactly $500. (See Gulf, C. & S. F. Ry. Co. v. Rambolt, 67 Texas, 654; Carroll v. Silk, 70 Texas, 23; Betterton v. Echols, 85 Texas, 214; Garrison v. Pacific Express Co., 69 Texas, 345; Lazarus v. Swafford, 15 Texas Civ. App., 369; Creswell v. Scoggins, 15 Texas Civ. App., 376.) At the time of the filing of the trial amendment the general jurisdiction of the County Court of Roberts County (theretofore removed) had been restored by an Act of the Twenty-ninth Legislature (Acts Regular Session 1905, page 111) which became effective July 14, 1905. The Act provided that when it took effect it should be the duty of the district clerks of the counties therein named to make full and complete transcripts of all orders on the criminal and civil dockets in cases then pending before the District Court of which cases by the provisions of the Act original jurisdiction was given to the County Court, and to deliver said transcripts with the original papers and a certified copy of the bill of costs in each case to the county clerk, who should file the same and enter the cases on the County Court docket for trial in that court. It follows, in the opinion of the majority, that upon the filing of appellant's said trial amendment, the District Court of Roberts County should have entered the proper order transferring the case to the County Court.

It is suggested that the Act related to pending cases only and that inasmuch as the trial amendment had not been filed at the time the Act began to speak or take effect, no authority existed for a transfer. The majority are of opinion, however, that the trial amendment should be construed as appellant's interpretation of his original petition, and as truly stating the exact limit of his claim for damages which had been erroneously stated or enlarged in the original petition. Until the Act referred to took effect the District Court of Roberts County had jurisdiction of the case viewed either as one of County or District Court cognizance, inasmuch as by law until then the District Court had the

jurisdiction of both courts. When the Act took effect the case was apparently one to which the Act did not apply, for on the face of the original petition the amount in controversy gave jurisdiction to the District and not the County Court. As interpreted, however, by the amendment the case at all times was a County Court case and when this fact appeared, was made known by the amendment, the majority think the legislative Act applied, and that the court could and should have then done what it had merely failed to do because of the mistaken or false allegation in the original petition.

The judgment will therefore be reversed and the cause remanded for proceedings in accordance with this opinion.

ON REHEARING.

On the original hearing we overlooked the effect that we now think must be given to the prayer of the trial amendment. The amended petition is concluded with the prayer "for judgment as in his original petition." In addition to the $1,500 damage alleged by the plaintiff in his original petition, he prayed to recover "interest thereon," with costs of suit, etc. We have concluded that the prayer of the amendment is sufficient to authorize the assessment of interest on appellant's claim. If appellant, under the allegations of his petition, is entitled to interest, it follows that we were in error in the conclusion originally announced that the District Court was without jurisdiction. The interest mentioned added to the $500 principal sum claimed in the amended petition clearly puts the case within the jurisdiction of the District Court, and the motion for rehearing will therefore be granted. This conclusion requires of us a consideration of the assignments of error, but before passing to them we will observe that the "interest" of which we speak in disposing of the motion for rehearing is not that allowed *eo nomine* by law, but such as is permitted by way of damages, and which we think, under the facts alleged, is included in appellant's measure of damages. (See Heidenheimer & Co. v. Ellis, 67 Texas, 426; Baker v. Smelser, 88 Texas, 26; 3 Washburn on Real Property, p. 528.)

It appears that upon the trial appellee specially excepted to appellant's original petition "because the said petition charges the alleged fraud for which plaintiff is seeking to recover was perpetrated more than five years before the institution of this suit, and fails to allege facts that will take said claim out of the statute of limitation; wherefore defendants say that said cause of action is barred by the two years statute of limitation," etc. The court sustained this exception, whereupon appellant filed the amendment mentioned above and in the original opinion, but the court ruled that the trial amendment did not meet the ruling of the court upon the special exception, and appellant having declined to further amend, the cause was dismissed. We think the court erred in the action stated. It was alleged in both the original and amended petitions that appellee Gray at the time of the fraudulent representations charged was in possession of the land afterwards proven to be not a part of the survey appellant had purchased; that appellee pointed the same out as part of the survey purchased, and that appellant believed such statements and was without reason for thinking otherwise. In the amended petition it

was alleged that appellant went into possession of the identical land so pointed out and remained in possession to the exact boundaries as pointed out until the 5th day of October, 1899, when appellant sold the land to another; that appellant, relying upon appellees' said representations, likewise represented the land as part of the survey sold; that appellant's vendee remained in possession until January 29, 1904, when he was ousted from the 116 acres of land so lost; that this date was the first intimation appellant had of the falsity of the representations made by appellee Gray; that appellant had continuously relied upon said representations as being true up to said date, and that appellant "could not have known the falsity of said representations by the use of ordinary diligence at any time theretofore," etc. There was no exception to the trial amendment and we think the averments are sufficient to admit proof on appellant's part that he was not negligent in his failure to have earlier discovered the fraud charged. It has sometimes been said that actual concealment is necessary, and that the mere fact of nondiscovery of a fraud is not enough. This can not mean that the defrauded party must necessarily have used some affirmative means to discover the fraud, for he might not have the slightest suspicion of its existence. The rule only requires that the defrauded party's ignorance must not be due to negligence; that he remains ignorant without any fault of his own; that he has not discovered the fraud and could not by any reasonable diligence discover it. The question is one of negligence *vel non*. (2 Pomeroy's Equity Jurisprudence, 3d ed., sec. 917, note 2, and authorities therein cited.)

This case is perhaps distinguishable from the case of Bass v. James, 83 Texas, 110, so much relied upon by appellees, in that, among other things, the holding there was to the effect that the trial court did not err in holding as a matter of fact that the purchaser by the exercise of reasonable diligence could have discovered the falsity of the representations relied upon in time to have avoided the bar of the statute. The decision there was upon the facts, and we can not say that all of the evidence upon which that opinion was based is set out in the opinion. It may be, therefore, that the facts of that case amply supported the conclusion there stated that the purchaser by survey could have earlier discovered the falsity of the representations alleged. But in the case now before us nothing on the face of the pleadings requires the holding that appellant was guilty of a want of due diligence in a failure to cause a survey of his land. Nothing on the face of the pleadings shows a reason for distrusting appellees' statements, and as before stated, we therefore think the allegations of the amended petition sufficient, in the absence of special exception, to admit proof upon the issue.

For the error of the court discussed the motion for rehearing is granted. the judgment reversed, and the cause remanded to the District Court of Roberts County.

Reversed and remanded.

HOUSTON & TEXAS CENTRAL RAILROAD COMPANY v. NUSSBAUM & SCHARFF.

Decided June 13, 1906.

Railway—Fences—Stock Unlawfully at Large.

The effect of the law with regard to fencing railways is superseded by the adoption of the law prohibiting stock from running at large; and one who turns his stock into his field, where such stock law is in force, knowing that no sufficient fence prevents access of stock therefrom to the railway track can recover for the killing it by a train only on proof of negligence.

Appeal from the County Court of Limestone County. Tried below before Hon. James Kimbell.

Baker, Bolts, Parker & Garwood and *Williams & Bradley,* for appellant.—Cited: Acts of 1899, p. 221, ch. 128, secs. 13, 19; Red River, T. & S. Ry. Co. v. Dooley, 80 S. W. Rep., 566; Houston & T. C. Ry. Co. v. Atlas P. Brick Works, 81 S. W. Rep., 792; Houston & T. C. Ry. Co. v. Hollingsworth, 68 S. W. Rep., 724; International & G. N. Ry. Co. v. Cocke, 64 Texas, 157.

No briefs for appellee were on file.

KEY, ASSOCIATE JUSTICE.—Nussbaum & Scharff, a private corporation, brought this suit and recovered damages from appellant for the alleged wrongful killing of a mule belonging to appellee. The agreed facts are as follows:

"1. That plaintiff, Nussbaum & Scharff, a corporation, was the owner of the mule for the killing of which this suit was brought.

"2. That said mule was killed on April 15, 1905, at night, and no one is known to have seen the killing, but the circumstances are such as to justify the conclusion that one of the defendant's trains killed it. It was found near the defendant's track next day, mangled, with its feet cut off.

"3. The plaintiff had rented and was in possession of a tract of about six acres of land on the east side of and adjoining defendant's right of way, and plaintiff's servants lived on same, and turned said mule into said field on the night before the killing.

"4. The defendant fenced its track about 15 years ago with a good and sufficient post and four-wire fence, about four feet high, and said fence remained in good repair until about four months before the killing, at which time, at the northwest corner of plaintiff's tract of land, by reason of some of the posts of the right of way fence being burned, the wires drooped down until they were only about 2½ feet high, by reason of the wire having been burned loose from the posts, and at the southwest corner of said field the right of way fence, about the same time got down the same way to about 2½ feet high, the ground sloping from the railroad to the field so that it was considerably higher on the right of way side of the fence than on the field side.

"5. The mule had been on the right of way the day before the killing, having gotten in at the low place at the northwest corner of the field,

and after the killing there were mule's tracks at both low places, indicating that the mule might have gotten over the right of way fence at either low place. The plaintiff's servant knew the mule had been on the right of way the day before, and knew the condition of the fence.

"6. The stock law, Acts of the Twenty-sixth Legislature, chapter 128, page 220, as subsequently amended, and as appears in Sayles Supplemental Statutes for 1897 to 1904, on pages 533 to 538, making it unlawful for horses, mules, jacks, jennets, etc., to run at large, etc., was regularly adopted in that part of Limestone County, Texas, embracing plaintiff's said field and defendant's adjacent right of way and adjacent territory in September, 1903, and has been in force and effect until now. The stock law prohibiting sheep, hogs and goats from running at large was also in effect in said territory at the time of the killing and has been in effect for many years.

"7. The mule killed was worth $125 when it was killed, and this was shown by all the testimony in the trial in Justice Court."

The stock law which prohibits livestock from running at large being in force at the time and place the mule was killed, and no testimony having been submitted tending to show negligence in the operation of the train which killed the mule, it is contended on behalf of appellant that appellee was not entitled to recover, although appellant had permitted its right of way fence to get out of repair so as to permit free access by livestock thereto. The contention is that the stock law supersedes the fence law, and that in the absence of negligence in the operation of the train, the company is not liable on account of livestock killed by the train. This contention seems to be sound, and it has already been sustained by two of our Appellate Courts. (Missouri, K. & T. Ry. Co. v. Tolbert, 90 S. W. Rep., 508; Galveston, H. & S. A. Ry. Co. v. Kropp, 91 S. W. Rep., 819.)

There being no probability that the plaintiff can strengthen its case upon another trial, the judgment is reversed and here rendered for appellant.

Reversed and rendered.

MORTON J. SMITH, ADMINISTRATOR, v. F. G. OWEN.

Decided June 13, 1906.

1.—Evidence—Executory Sale—Vendor's Lien.

To show plaintiff's right to recover as administrator the land sued for in trespass to try title, defendant having plead limitation to the debt, which was secured by vendor's lien reserved by plaintiff's intestate on sale to defendant, it was competent to introduce a note executed by defendant to plaintiff, the administrator, in connection with evidence that it was given in part for the balance due on the original debt for the land.

2.—Vendor's Lien—Partial Release.

Where the vendor released the lien for purchase money on various portions of the land, sold by vendee to third parties, he could, on refusal of the vendee to pay the balance of the purchase money, recover, in trespass to try title, the part of the land still held by the vendee.

3.—Same—Pleading.

The plaintiff, seeking to recover back land from the vendee on account of refusal to pay the purchase money, and where he has released the lien on portions sold off by the vendee, should, it seems, describe the land remaining in the vendee's hands and sought to be recovered, and not sue for an undivided interest in the entire tract originally sold.

4.—Charge—Assuming Facts.

A requested charge must not assume facts which are to be determined by the jury.

5.—Trial Amendment—Taxing with Costs.

It is within the discretion of the court to tax a party with costs as a condition of permitting a trial amendment to let in evidence excluded under previous pleading.

Appeal from the District Court of Hill County. Tried below before Hon. W. C. Wear.

Prendergast & Sanford, James K. Parr, and *Vaughan & Works,* for appellant.—The note was admissible in evidence as an act of appellee, in connection with the testimony, for the purpose of establishing the fact that there remained due and unpaid a portion of said note of date February 14, 1878. McCullon v. Cohen, 39 S. W. Rep., 973; Downey v. Taylor, 48 S. W. Rep., 541; Wells v. Fairbanks, 5 Texas, 584; Harris v. Catlin, 53 Texas, 1; Baker v. Compton, 52 Texas, 252.

The rule is that when a vendor seeks to enforce his lien for the collection of a note, which was given in part for the land and in part for other considerations it is incumbent on him to show how much of the note was given for the land. Wasson v. Davis, 34 Texas, 168; Swain v. Cato, 34 Texas, 398; Sutton v. Sutton, 39 Texas, 549.

The court erred in instructing the jury to find a verdict for the defendant, as the evidence established the right of the plaintiff as the administrator of the estate of N. T. Sneed, deceased, to recover an undivided interest, namely, about 66 acres in the 458 acre tract of land sued for and described in plaintiff's pleadings. Jackson v. Palmer, 52 Texas, 427; Helm v. Weaver, 69 Texas, 143; Moore v. Giesecke, 76 Texas, 543; Robertson v. Guerin, 50 Texas, 317; Renfro v. City of Waco, 33 S. W. Rep., 766; Slaughter v. Owens, 60 Texas, 668; Ansley v. Baker, 14 Texas, 613; Ellis v. Singtelary, 45 Texas, 27; Roosevelt v. Davis, 49 Texas, 463; Wright v. Wooters, 16 Texas, 380; Burgess v. Millican, 50 Texas, 403; Clements v. Neal, 1 Posey, U. C., 41; Thompson v. Westbrook, 56 Texas, 265; Estes v. Browning, 11 Texas, 237; White v. Cole, 9 Texas Civ. App., 383.

Although the plaintiff's suit was to recover 458 acres of the Ussary survey described by field notes in his petition, yet the evidence establishing his right to recover an undivided interest, he was entitled to recover such interest, namely, 66 acres. Rev. Stats., arts. 5270, 5271; Schmidt v. Talbert, 74 Texas, 451; Murrell v. Wright, 78 Texas, 519; Galveston Land Co. v. Perkins, 26 S. W. Rep., 256; Williams v. Davis, 56 Texas, 250; Wood v. Welder, 42 Texas, 396; Thompson v. Dutton, 71 S. W. Rep., 544.

Where the ruling of the court is erroneous, and in order to meet such ruling and to save delay, the party against whose interest such ruling

has been made may amend so as to make his pleadings conform to such rulings, and in such case it is error for the court to impose terms by taxing cost against the parties so amending. Dailey v. Wynn, 33 Texas, 622.

Morrow & Smithdeal, for appellee.—There was no error in excluding the $620 note. Middlebrook v. Zapp, 73 Texas, 31; Longcope v. Bruce, 44 Texas, 436; La Pice v. Caddenhead, 24 Texas Civ. App., 364.

There being no description of the 66 acre tract, either in the pleadings or in the proof, there was no foundation for a judgment in favor of the plaintiff, and the court did not err in directing a verdict for the defendant. Rev. Stats., art. 5250, subd. 2; Roche v. Lovell, 74 Texas, 191; Converse v. Langshaw, 81 Texas, 280; Stephens v. Motl, 81 Texas, 121; Rev. Stats., art. 5272.

The plaintiff not having furnished the court with any description of land which he claimed to be entitled to, and there being no pleadings or proof upon which a judgment could be rendered for plaintiff all of the costs of the case were properly taxed against the plaintiff. Rev. Stats., art. 1188; Rule 27, District Courts; Harris v. Spence, 70 Texas, 619; Hatchett v. Connor, 30 Texas, 104.

EIDSON, ASSOCIATE JUSTICE.—Appellant, as administrator of the estate of N. T. Sneed, deceased, brought this suit in the court below against appellee to recover 458 acres of land, a part of the Geo. H. Ussary survey in Hill and Navarro Counties, the said 458 acres being described by metes and bounds in appellant's petition. The petition is in the usual form of a petition in a suit of trespass to try title, with the additional allegations "that plaintiff's right is based upon a vendor's lien note executed December 5, 1892, for $620 due December 5, 1894, which said note was executed in renewal of a vendor's lien note for the purchase money of the above described 458 acres of land sold to defendant F. G. Owen by N. T. Sneed on the 14th day of February, 1878, wherein the right and title to said above described 458 acres of land was retained in the said N. T. Sneed until said original note for the sum of $1,405.30 should be paid; said $620 note of date December 5, 1892, being in renewal of said original note of $1,405.30 as follows: That on or about the 4th day of January, 1888, in an accounting had between said N. T. Sneed and F. G. Owen as to said original note of $1,405.30 there was due thereon a balance of $111.08, for which sum the said F. G. Owen then and there executed his certain note of date January 4, 1888, being in renewal of and in extension of said note of $1,405.30 to the extent of the balance due thereon, said renewal note for $111.08 being payable to N. T. Sneed by the said F. G. Owen; that on the 5th day of December, 1892, plaintiff herein, as administrator of the said N. T. Sneed, deceased, accepted and received from the defendant F. G. Owen, and the said defendant F. G. Owen executed said note of date December 5, 1892, for $620 as a renewal of and extension of said note for $111.08, as well as of said original note for $1,405.30, the amount of the principal and interest due on said note for $111.08, the interest thereon being from its date, viz.: January 4, 1888, at the rate of ten percent per annum up to December 5, 1892, included in and forming a part of said note in the

sum of $620 hereinabove set out." The petition contained a prayer for restitution of the premises, costs of suit, etc.

Appellee answered in the court below by general demurrer, general denial, plea of not guilty, plea of the statutes of limitations of three, five and ten years, plea that plaintiff was estopped from claiming any right under any vendor's lien upon the land on the ground that he had elected to waive such rights and to bring his action in trespass to try title; special plea that if plaintiff had any lien upon the land that same had been in all things released and abandoned, and that if plaintiff has any pretended lien upon the premises described in his petition, the same is not a vendor's lien but a contract lien, and that the same is void, because the premises upon which same is sought to be enforced is the homestead of defendant, and that so far as any claim against him on account of any vendor's lien charged to have been executed by him is concerned, that the same was barred by the statute of limitations of four years, which he pleaded in bar of this suit; and, further, that if there was any indebtedness owing to plaintiff on said land at any time, the same has long since been paid.

The trial was before a jury, and after plaintiff had introduced his evidence, the court peremptorily instructed the jury to return a verdict in favor of the defendant, which being done, judgment was accordingly entered in favor of defendant.

From the petition of appellant it clearly appears that his cause of action was predicated upon an executory contract of the sale of the land described in his petition by his intestate to appellee and default in the payment of a part of the purchase money for said land by appellee. The allegations in the petition above quoted relating to the $620 note, were simply made for the purpose of showing that a part of the purchase money for the land was unpaid and the amount thereof; and it also appears from the pleadings of the parties that the note for the unpaid purchase money was barred by the statute of limitations at the date of the institution of this suit, and that appellee was asserting the statute of limitations as a bar to the recovery by appellant of the unpaid purchase money for the land. These facts authorized the suit for the recovery of the land by the appellant. It is well settled by a long line of decisions in this State that where the contract for the sale of land is executory, as in the instance of the sale and conveyance of land by deed which reserves the vendor's lien, that the superior title remains with the vendor, notwithstanding the deed, and in default of payment of the purchase money, he may recover the land from the vendee. (Lanier v. Foust, 81 Texas, 189; Hale v. Baker, 60 Texas, 217; Roosevelt v. Davis, 49 Texas, 463; Peters v. Clements, 46 Texas, 123.) And it is immaterial that the notes given for the purchase money have become barred by the statute of limitations. Without payment of the purchase money, the vendee can not obtain absolute title to the property as against the vendor. (Hale v. Baker, supra, Bakes v. Ramey, 27 Texas, 59; Ball v. Hill, 48 Texas, 634.)

Appellant's first assignment of error complains of the action of the court in refusing to permit him to introduce in evidence the note for the sum of $620, of date December 5, 1892, and due December 5, 1894. executed by the defendant F. G. Owen, and payable to the order of Morton

J. Smith, administrator of the estate of N. T. Sneed, which was offered in evidence by him after he had testified that after he qualified as administrator of the estate of N. T. Sneed, deceased, he found among said Sneed's papers two notes executed by the defendant, one for $220, and the other for $111.08; that he went to see the defendant at his home and exhibited said two notes to him; that the defendant stated that the note for $220 was for rent, and that the note for $111.08 was for the balance due by him, F. G. Owen, on a large tract of land he had purchased from N. T. Sneed, and that he owed both of the notes; that the note for $620 was executed in renewal of both of said notes, which were torn up in defendant's presence after said note for $620 was executed by him.

We think this assignment should be sustained. The suit was not based on the $620 note, the petition alleged the execution and delivery of that note simply to show that a part of the original deferred consideration was unpaid, the amount thereof and that such fact was acknowledged by the appellee by the execution of that note. The note should have been admitted in evidence for this purpose; and the fact that the evidence on the trial showed that this note only included $111.08 of the deferred purchase money for the land, and that the balance of the amount thereof was for rent, did not render the same inadmissible for the purpose of showing that there was a balance of the purchase money for the land unpaid, the amount thereof, and that appellee admitted that fact. The evidence introduced in connection with this note showed that $111.08 of the amount thereof was a part of the original deferred payment for the purchase money of the land, to secure the payment of which a lien was expressly reserved in the deed from appellant's intestate to appellee. The suit being for the recovery of 458 acres of land described in appellant's petition, he would be entitled to recover whatever portion of said land the evidence showed the purchase money of to be unpaid, and an express lien upon which had been reserved in the deed. The testimony showed that N. T. Sneed, appellant's intestate, conveyed the 458 acres of land described in appellant's petition to appellee by deed dated the 14th day of February, 1878, in part consideration of the execution and delivery by appellee of his promissory note for $1,405.30, bearing ten percent interest from date of deed, and due January 1, 1879, and that a lien was expressly retained in said deed to secure the payment of said note; that subsequently and up to the 4th day of January, 1888, appellee had paid all of said note except $111.08, and during said interval had sold off of said tract of 458 acres of land 104 acres to Vince Bracken, 74¾ acres to Asbury Burns, 72 acres to Anderson Drake, 111¼ acres to Prince Henderson, and to Austin Lockhart 30 acres, making a total of 392 acres; and that on said date last mentioned, appellant's intestate N. T. Sneed, executed an instrument reciting the execution of the deed by him to appellee for said 458 acres of land, and the execution and delivery by appellee to him, the said Sneed, of his promissory note for $1,405.30 for the deferred purchase money of said land and the retention of a lien on said land in the deed to secure the payment of said note, and the payment of all of said note except the sum of $111.08, and that appellee had sold to the parties above named the number of acres mentioned respectively, and that in order to accommodate appellee

and the several parties to whom he had sold the land mentioned, appellant released his lien on the land sold by appellee to the parties above mentioned, but still retained his lien upon the 66 acres of said 458 acre tract remaining and then occupied by appellee, for the sum of $111.08 balance of the purchase money due appellant for said 458 acres of land, and that appellee had on that date executed to appellant his promissory note for said amount, bearing 10 percent interest from date.

The testimony also shows that after his qualification as administrator of the estate of N. T. Sneed, and in the year 1892, appellant found among the papers of the said Sneed said vendor's lien note for $111.08, and another note for $220, which was not a vendor's lien note; that he took both notes to appellee and inquired of him about them, and appellee stated, in substance, that the $111.08 note was a vendor's lien note and given for a part of the purchase money of the land he occupied, which was a part of the 458 acres sued for and ought to be about 66 acres, but he did not have but about 55 acres, and that appellee, at the suggestion of appellant, agreed to include the amount of both of these notes in one note, and in accordance therewith, executed the $620 note offered in evidence. The testimony showed that no part of this amount of $111.08, which was practically conceded to be a part of the purchase money for said land, had been paid. This testimony, in connection with that excluded by the court over the objections of appellant, as above stated, in our opinion tended to show appellant to be entitled to recover that part of the land occupied by appellee. (Thomson v. Dutton, 71 S. W. Rep., 544.)

We therefore hold that the court below erred in peremptorily instructing the jury to return a verdict in favor of appellee. However, we do not wish to be understood as commending the method of pleading adopted by appellant in this case in view of the facts developed by the evidence. The appellant, at a moderate expense, could have had the land remaining after the tracts sold off the original tract of 458 acres were excluded, surveyed, and thus obtained a particular description of the land he sought to recover and embraced such description in his petition; or he could have sued for the 458 acres, describing same in his petition, less the tracts sold off, giving in his petition a particular description of such tracts, and a particular description of the land sued for could have been arrived at by the process of elimination.

The court did not err in refusing to give to the jury appellant's special charge set out in his third assignment of error. It was a question of fact to be determined by the jury from the evidence as to whether appellant was entitled to recover any part of the land sued for, and the special charge assumed that he was entitled to recover an undivided interest of 66 acres.

The matter complained of in appellant's fourth assignment of error was within the discretion of the court, and the record does not disclose any abuse of such discretion. As the case will be reversed and remanded, appellant's fifth assignment of error becomes unimportant.

For the reasons above indicated, the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

Application for writ of error dismissed for want of jurisdiction.

BEN C. RICHARDS v. S. G. HOLFORD.

Decided June 13, 1906.

Contract—Damages.

One who pays money to another in consideration of the latter's agreement to furnish him with State and county license as a retail liquor dealer may recover back the money paid on failure to comply with such agreement, though he has pursued the occupation without license and without being disturbed by the county officers.

Appeal from the County Court of McLennan County. Tried below before Hon. G. B. Gerald.

Sluder & Neal, for appellant.

No briefs for appellee were on file.

EIDSON, ASSOCIATE JUSTICE.—This is an appeal from a County Court judgment. The questions raised by the assignments of error do not require extended discussion. If appellee, in consideration of the agreement of appellant to furnish him with State and county license to pursue the occupation of retail liquor dealer, paid him the amounts alleged in his petition, and appellant failed to comply with such agreement, he would be liable to appellee for the amount he paid him, although appellee may have pursued the occupation without the license and not been disturbed. Appellee's right to recover was based upon appellant's failure to furnish the license, and it was unimportant that the officers of the law did not interfere with his pursuit of the occupation. The testimony was sufficient to support the judgment of the court.

All of appellant's assignments of error are overruled and the judgment is affirmed.

Affirmed.

YOUNG C. GRAY v. B. F. ELEAZER ET AL.

Decided June 13, 1906.

Public Weigher—Penalty.

In an action by a public weigher to recover the statutory penalty on account of others weighing cotton in his territory (Acts of 1889, ch. 155, p. 264) the petition must allege that the defendants were factors, commission merchants, or persons similarly situated, in order to bring the case within the statute.

Appeal from the District Court of Delta County. Tried below before Hon. R. L. Porter.

Patterson & Sharp and *Ewing & Boyd,* for appellant.

Wood & Phillips, for appellees.

KEY, ASSOCIATE JUSTICE.—Appellant being a public weigher in

Delta County, brought this suit against appellees to recover statutory penalties and punitory damages on account of the latter's weighing cotton for other persons and charging fees therefor in the territory wherein appellant was the public weigher. The petition did not charge that the defendants were factors or commission merchants, or persons engaged in a similar business. The trial court, following Whitfield v. Terrell Compress Co., 62 S. W. Rep., 117 and Galt v. Holder, 75 S. W. Rep., 568, held that on account of the omission referred to, the petition failed to state a cause of action and sustained a general demurrer interposed to it. That ruling is assigned as error, appellant contending that the statute upon which the suit is based was properly construed by this court in Davidson v. Sadler, 23 Texas Civ. App., 601. That case seems to be in conflict with the two latter cases just referred to, in both of which the Supreme Court refused applications for writs of error. The question involved in this case was the only question involved in Galt v. Holder, supra, and the action of the Supreme Court in refusing to grant a writ of error elevates that decision to the dignity of final authority. Hence we hold that the trial court ruled correctly when it sustained the general demurrer to the plaintiff's petition. Judgment affirmed.

Affirmed.

GEO. W. PIRTLE v. W. NELL ET AL.

Decided June 13, 1906.

Statement of Facts—Stenographer's Report.

A separate document, sent up with the transcript, endorsed "statement of facts," purporting to contain all the facts proven on the trial, and approved and signed by the judge, but not showing otherwise that it is the official stenographer's transcript of the evidence, nor that it was submitted to the interested parties for their objections, nor that the documentary evidence it contained was embraced therein by direction of the court does not comply with the law (Acts 29th Leg., Regular Session, p. 219) and can not be considered as a statement of facts.

Appeal from the District Court of Fannin County. Tried below before Hon. Ben. H. Denton.

W. A. & H. G. Evans, for appellant.

McGrady & McMahon, for appellees.

EIDSON, ASSOCIATE JUSTICE.—There is no legal statement of facts embraced in or sent up with the record in this cause. There is a paper sent up with but separate from the transcript in this cause, endorsed "statement of facts," and, after giving the style and number of the case, beginning as follows: "Be it remembered that upon the trial of the above styled and numbered cause, the following were the facts and all the facts proven." Then follows a statement of the testimony taken upon the trial, including documentary and oral, and at the end of the statement is the word "approved," and under that is the signature and official character of the trial judge.

At the time of the trial and the preparation of this document the Act of the Twenty-ninth Legislature was in effect, which provides that the official stenographer's transcript of the oral evidence adduced upon the trial of the case, after being submitted to the interested parties for any objection thereto, and being found to be correct and approved by the trial judge, should constitute the statement of facts of the oral evidence in the case; and also provides that any original documentary evidence, sketches, maps, plats or other matters introduced in evidence, and if embraced in the stenographer's report, may be made a part of the record of said cause by written direction of the court, which may be sent up in the original form, if required by either party to the suit, or transcribed by the clerk with other parts of the record therein. (Acts 29th Leg. Reg. Sess. p. 219.) It does not appear from this paper that it is the official stenographer's transcript of the evidence; neither does it appear that same was submitted to the interested parties for their objections, nor that the documentary evidence was embraced in such transcript by the direction of the court. The requirements of the law in order to give this paper the standing of a statement of facts have not been complied with, and therefore we can not consider it as a statement of facts. (Tate v. Betts, 15 Texas Ct. Rep., 830.)

The assignments of error presented in appellant's brief relate to questions of evidence, and hence can not be considered by us in the absence of a statement of facts.

The judgment of the court below is affirmed.

Affirmed.

Writ of error refused.

J. W. COLE v. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY.

Decided June 13, 1906.

Railway—Killing Stock—Fence—Defective Gate—Negligence.

The railway track being fenced, a gate was put therein for the convenience of the owner of adjoining land, with a device for automatically closing and latching, which was suffered to get out of order so that it was necessary for those using it to tie it with a rope. Plaintiff's horse, entering thereby when it was neither latched nor tied, was killed by a train. Held, that there was sufficient evidence of defendant's negligence in failing to keep the gate in repair to require submission to the jury.

Appeal from the District Court of Henderson County. Tried below before Hon. B. H. Gardner.

On appeal from Justice Court, where plaintiff prevailed, the district judge directed a verdict for defendant, and plaintiff appealed.

Miller & Royall, for appellant.—The first duty on the railroad company to keep the gates in repair, and then the landowner, or person in possession of the premises, is required to keep the gates shut. Texas & Pac. Ry. Co. v. Glenn, 30 S. W. Rep., 845; Missouri, K. & T. Ry. Co. of Texas v. Johnson, 39 S. W. Rep., 323; Galveston, H. & S. A. Ry. Co. v. Wessendorf, 39 S. W. Rep., 132; Missouri, K. & T. Ry. Co. v. Bellows,

39 S. W. Rep., 1000; St. Louis, S. W. Ry. Co. v. Adams, 58 S. W. Rep., 1035.

E. B. Perkins and *Frost & Neblett,* for appellee.—We think the following authorities sustain the charge of the court in instructing a verdict in favor of appellee. Missouri, K. & T. v. Hanacek, 93 Texas, 451; Texas & P. Ry. Co. v. Glenn, 8 Texas Civ. App., 303; St. Louis S. W. Ry. Co. v. Adams, 24 Texas Civ. App., 236; Missouri, K. & T. v. Johnson, 39 S. W. Rep., 323.

EIDSON, ASSOCIATE JUSTICE.—This is an action by appellant against appellee for damages resulting from the alleged killing by one of appellee's engines of a horse owned by appellant. The suit originated in the Justice's Court, in which appellant obtained a judgment from which appellee appealed to the District Court, where, after appellant introduced his evidence, the court peremptorily instructed the jury to return a verdict for the appellee, and this action of the court is assigned as error by appellant. Appellant's contention under this assignment is that there was sufficient evidence adduced upon the trial showing liability upon the part of appellee for the damages resulting from the killing of the horse to submit the question to the jury for their determination, and we are disposed to agree with appellant in this contention.

The testimony tends to show that the track of appellee was fenced, but that a gate was constructed by appellee near the point where the horse was killed for the convenience of the owner of the adjoining lands, and which were at the time the horse was killed in the possession of appellant, and that this gate was left open on this occasion, and that the horse passed through it and went onto appellee's right of way and track and was killed by one of its engines. The testimony also tends to show that this gate was out of repair on this occasion and had been for some time previously; that it was originally constructed with a patent latch, so that after being opened it would swing back and latch or fasten automatically, but at this time and for some time previously, the post to which the gate was swung had given way or settled to such extent that it leaned forward, so that the patent latch would not operate and fasten the gate, and that the gate could swing backward and forward passing the latch-post, so that stock could pass through the opening, and that the only way the gate could be kept fastened was by tying it with a rope, and that appellant's landlord had furnished a rope with which to tie the gate, and thus fasten it, but when the rope was not used to fasten the gate stock would pass through.

The testimony tends to show that both appellant and his landlord informed the section foreman and other employes of appellee a number of times before the horse was killed of the defective condition of the gate, and requested them to have same repaired which they failed to do; that in order to have repaired the gate so that it would properly fasten, it would have been necessary to put in a new post and tighten the fence adjoining it, which would have cost about $10.

We think this testimony entitled the appellant to have the case submitted to the jury. The law makes railroad companies liable for the value of stock killed or injured by their locomotives and cars independent of

any negligence on their part when their tracks are not fenced, but when the tracks are fenced they are only held liable for injuries resulting from want of ordinary care. (Sayles Rev. Stat., art. 4528.) If a railroad company constructs a gate as a part of the fence enclosing its right of way for the convenience of the owner of the adjoining land, it is its duty to exercise ordinary care to keep such gate in repair, so that same may be properly closed; and when that is done, it devolves upon the owner of the land, or person occupying same, to keep the gate closed. If the railroad company fails to exercise ordinary care to keep such gate in repair, and on account of such failure the stock of the owner of the adjoining land goes upon the track of such railroad company and is killed, it will be liable for the damages resulting therefrom. (Texas & P. Ry. Co. v. Glenn, 8 Texas Civ. App., 303; St. Louis S. W. Ry. Co. v. Adams, 24 Texas Civ. App., 236.)

The judgment is reversed and the cause remanded.

Reversed and remanded.

INTERNATIONAL HARVESTER COMPANY OF AMERICA v. R. A. CAMPBELL.

Decided June 13, 1906.

1.—Pleading—General Demurrer—Reasonable Intendment.

Every reasonable intendment from the allegations of a pleading taken as a whole will be indulged against a general demurrer. Where from the allegations of plaintiff's petition the intendment is clear that plaintiff accepted terms of employment offered by defendant, a general demurrer on the ground that there was no specific allegation of acceptance was properly overruled.

2.—Evidence—Letter—Genuineness—Circumstantial Proof.

The genuineness of a writing may be proved by indirect or circumstantial evidence. Where a letter was written upon the letterhead of the defendant; was addressed to its agent, and was shown by him to plaintiff, and the signature to said letter was the same as that affixed to other letters written by defendant; and where defendant had been duly notified to produce said letter and failed to do so without excuse or denial of its existence or possession, these facts when taken in connection with the contents of the letter itself were sufficient proof of the genuineness of such letter.

3.—Admission of Evidence Without Objection.

The general rule is that objection to testimony must be made when it is offered, and if not made then it will be considered waived and its admission no ground for a new trial.

4.—Written Instrument—Secondary Evidence of Contents.

When an instrument is such as would naturally be in possession of the adverse party or his agent, and when last seen was in such possession, and the party after being duly notified refuses to produce or account for it on the trial, secondary evidence of its contents is admissible.

5.—Agent—Scope of Authority—Evidence.

Evidence that the same agent who employed plaintiff employed another person to work for the defendant was a circumstance to be considered by the jury in determining the scope of such agent's authority. While mere proof that a person assumed to act as the agent of another is not alone sufficient to establish agency as against the principal, yet if it is further shown that the alleged principal knew or must have known of the acts of the alleged agent and made no objection, it may be sufficient.

6.—Interrogatory—Answer—Conclusion of Witness.

The following interrogatory was propounded to a witness: "Had you at any time, as such division manager, or has there passed through your hands as such division manager, or is there known to you, any contract by which plaintiff was employed as canvasser, solicitor or drummer for any territory operated by the Plano Division of defendant company during the year 1903? If your answer be yea, state when, under what circumstances, and attach such contract, or copy thereof, if such has ever come into your custody and under your control or within your knowledge." To which the witness answered: "I had not. There has not been, and there is not, such a contract. No such contract ever existed." Held, the statement "no such contract ever existed" was properly excluded as a conclusion of the witness.

7.—Contract—Custom as Evidence of.

Proof of a contract *vel non* can not be made by showing the customary method of either party in making such contracts.

8.—Exclusion of Testimony—Harmless Error.

The erroneous exclusion of testimony is harmless when there is other testimony in the record to the same effect and not objected to.

9.—Testimony—Hearsay—Inference.

A witness was asked: "Is it not a fact that prior and subsequent to the employment of plaintiff, C. employed agents and salesmen for defendant company in other places than San Antonio, Texas?" To which he answered: "C. had no authority to employ an agent or salesman in any territory in the Plano Division of the defendant company, and he had never employed any one therein." Held, the first part of the answer, relating to C.'s authority, was properly excluded as hearsay, but if not hearsay it was a conclusion or inference of the witness.

10.—Statute of Frauds—Defense—Pleading.

In a suit affected by the statute of frauds the petition will be sufficient if it allege a contract generally without stating whether it is in writing or not. As an obverse corollary to this rule it would seem that the statute of frauds as a defense must be pleaded. Hart v. Garcia (63 S. W. Rep., 922) modified.

11.—Same—Peremptory Instruction—Appeal.

A peremptory instruction, which does not disclose the ground on which it is asked, does not so raise the question of the statute of frauds as to make it available on appeal.

12.—Contract—Reducing to Writing—When Complete.

Although the terms of a contract may all be agreed upon, still, if the parties make it a condition to the existence of a contract that the terms agreed upon be reduced to writing, and signed by them, there is no contract until this is done.

13.—Oath of Jurors—Charge Upon.

Conditions may arise which make it the duty of the court to remind the jury in its charge of the obligations of their oath as to the law and the evidence they should be governed by. In any event, such charge is harmless.

14.—Charge—Variance.

When evidence is admitted without objection, the question of variance can not be raised upon an instruction to the jury.

15.—Contract—Statute of Frauds—Evidence Without Objection.

While, in a suit on a contract, a general denial is sufficient to let in the defense of the statute of frauds, the defendant must make his defense good by objecting to parol evidence to prove the contract, and a failure to do so operates as a waiver of the statute if not specially pleaded.

Appeal from the District Court of Bexar County. Tried below before Hon. A. W. Seeligson.

Cobbs & Hildebrand and *William Aubrey,* for appellant.—In declaring upon a simple contract the pleader must aver the existence of a consideration, and if the consideration consists of mutual promises, these must be alleged as well as that they were concurrent. James v. Fulcrod, 5 Texas, 512; Flanders v. Wood, 83 Texas, 280; First National Bank of Marble Falls v. Border, 9 Texas Civ. App., 676; 4 A. & E. Ency. Pl. & Pr., pp. 928, 931.

In order to admit parol evidence of the contents of a letter its genuineness must first be established.

Agency can not be established by the acts or declarations of the alleged agent. Noel v. Denman, 76 Texas, 306; Cooper v. Sawyer, 73 S. W. Rep., 992; Coleman v. Colgate, 69 Texas, 92; Mills v. Berla, 23 S. W. Rep., 910, and cases cited in 4 Green Texas Digest, p. 9060, sec. 7.

The objection that the answer of a witness in a deposition is not responsive, goes to the manner and form of taking such deposition, and should be made in writing at least one day before the trial with due notice to the opposite counsel. Rev. Stats. 1895, art. 2289; Allen v. Atchinson, 26 Texas, 616; Lee v. Stowe, 57 Texas, 444; Parker v. Chancellor, 78 Texas, 524.

When the issue is as to the power of an agent, evidence that such power could be exercised only in a particular manner and in accordance with an established system of the principal is admissible. 1 Morawetz Corporations, 507.

Where a party testifies that the general agent of another authorizes the acceptance of his application for employment, such agent may testify that he never contemplated or intended accepting such application. Hamburg v. Wood, 66 Texas, 168; Robertson v. Gourley, 84 Texas, 579; Wade v. Odle, 21 Texas Civ. App., 659; Dittman v. Weiss, 31 S. W. Rep., 69; Peightal v. Cotton States Building Co., 61 S. W. 432.

It was certainly competent for Bedell, when charged with doing an act, to testify not only that he did not do the act charged but never contemplated it or intended to do it. It was a fact which the jury should have been permitted to consider.

A party can only recover upon the contract alleged by him. Mims v. Mitchell, 1 Texas, 447; Gammage v. Alexander, 14 Texas, 419; Parker v. Beavers, 19 Texas, 411; Flores v. Smith, 66 Texas, 115.

The charge of the court should conform to the pleadings of the parties. People's Building Association v. Elliott, 33 S. W. Rep., 546; Texas, etc., R. Co. v. Johnson, 34 S. W. Rep., 189; Murchison v. Mansur-Tibbetts Imp't. Co., 37 S. W. Rep., 605.

A contract of employment for one year to commence in the future is within the statute of frauds requiring agreements not to be performed within one year from the making thereof to be in writing. Rev. Stats. 1895, art. 2543; Moody v. Jones, 37 S. W. Rep., 379; Wood Master & Servant, sec. 191 and notes; 29 A. & E. Ency. Law, 943 and cases cited.

The defense of the statute of frauds may be raised under a general denial. Patton v. Rucker, 29 Texas, 402; Jones v. Carver, 59 Texas, 293; Aiken v. Hale, 1 Posey U. C., 321 Zanderson v. Sullivan, 91 Texas, 503; 2 Thompson Trials, sec. 2242.

When parties negotiating a contract agree that the contract shall be evidenced by writing in which the terms and conditions of the contract

shall be set forth, the contract is incomplete and unenforceable if not so reduced to writing. Morrill v. Tehama Consolidated Mill & M. Co., 10 Nev., 125; Boyd v. Hind, 36 Eng. L. & Eq., 566; Dodge v. Hopkins, 14 Wis., 630; Crane v. Partland, 9 Mich., 493.

Davis & McFarland, for appellees.—The execution of a document may be proven by circumstantial evidence, though the witness did not see the letter signed. Wigmore on Evidence, vol. 3, sec. 2131; Crain v. Huntington, 81 Texas, 615.

Secondary evidence of the contents of a writing is admissible when the paper is in the hands of an opposite party and notice has been given to produce. International & G. N. R. R. v. Donaldson, 2 Texas App. Civ. Cas., 241.

The general rule is that agency can not be established by the acts and declarations of an agent, nor can the extent of authority be thus shown, but the rule is believed to be modified with reference to concerns which can transact business only through agents, in which case the acts and declarations of the alleged agent may be admissible as circumstances to aid in proving agency. Pullman Palace Car Co. v. Nelson, 54 S. W. Rep., 625; Missouri Pac. Ry. Co. v. Simons, 25 S. W. Rep., 996.

The evidence of a custom is irrelevant when the issue is upon an express contract, either as original or rebutting testimony. Moore v. Kennedy, 81 Texas, 146; International & G. N. Ry. Co. v. Gilbert, 64 Texas, 538-541; Neill v. Billingsley, 49 Texas, 167; Lyons v. Texas & Pac. Ry., 36 S. W. Rep., 1007.

"Such statute (meaning the statute of frauds) is a shield which a party may use or not for his protection, just as he may use statute of limitations.

"It is not available to a party unless specifically pleaded, and he can not for the first time avail himself of it upon appeal." League v. Davis, 53 Texas, 14; Pool v. Wedemeyer & Schulte, 56 Texas, 288; Day et al. v. Dalziel, 32 S. W. Rep., 377; Hart v. Garcia, 63 S. W. Rep., 922; Robb v. San Antonio St. Ry. Co., 82 Texas, 395.

In the formation of a contract, if the agreement is substantially reached, and nothing remains but to put into writing the terms upon which the parties have agreed, the contract stands complete. Green v. Cole, 103 Mo., 70, 15 S. W. Rep., 317; Lowrey v. Danforth, 69 S. W. Rep., 39 (Mo. App.); Allen v. Chouteau, 14 S. W. Rep., 873.

Objection to admissibility of evidence can not be raised for the first time in a requested charge. White et al. v. Pyron, 62 S. W. Rep., 82; Jones v. Meyer Bros. Drug Co., 61 S. W. Rep., 553 (writ of error refused by Supreme Court).

NEILL, ASSOCIATE JUSTICE.—This suit was brought by appellee against the appellant to recover $660 damages for a breach of contract of employment. The appeal is from a judgment for $570 in favor of the appellee.

The first assignment of error insisted on complains of the court's overruling a general demurrer to plaintiff's petition.

The petition alleges, "that defendant on or about June 4, 1903, acting through its duly authorized agent, J. D. Cameron, while acting as such

agent, and within the apparent scope of his authority, and while being held out by the defendant to this plaintiff and the world as such agent, employed plaintiff to sell goods, wares and merchandise of defendant in the San Antonio territory, in the capacity of a drummer or salesman; that said employment was for the period of twelve months, beginning on the 15th day of June, 1903, and ending on the 15th day of June, 1904; that in consideration of the services of plaintiff as aforesaid, defendant, acting by and through its said agent, agreed and promised and contracted to pay plaintiff the sum of $95 per month, for each month during the full period of plaintiff's employment.

"That in pursuance of said contract plaintiff, on and continuously after the said 15th day of June 1903, tendered his services to defendant, and at all times thereafter offered to do and perform any and all work required of him under his contract of employment; but that defendant has, at all times since said agreement and contract was made, failed and refused to allow plaintiff to enter upon his duties as drummer or salesman under said contract, and has failed and refused to pay plaintiff anything whatever by reason of said contract.

"That at the time plaintiff entered into said contract with defendant, as alleged, plaintiff informed defendant's said agent that he, plaintiff, was then in the employment of Andrews & Company at San Antonio, Texas, and that he had permanent employment at a salary of sixty dollars per month.

"That said agent acting for defendant, and in full line and scope of his duty as such agent, on or about the 4th day of June, 1903, requested plaintiff to give up his said position and be ready to assume his duties for defendant under said contract, and on said 15th day of June, 1903, and that by reason of said contract plaintiff did give up his said position with said Andrews & Company and was ready to begin work for defendant under said agreement and contract of said date."

This is enough of the petition to show the objection made to it under the assignment, which is disclosed by the following proposition, asserted under it in appellant's brief: "In declaring upon a simple contract the pleader must aver the existence of a consideration, and if the consideration consists of mutual promises, these must be alleged as well as that they are concurrent." The rule is well established that when a pleading is challenged by a general demurrer, every reasonable intendment from the allegations contained, taken as a whole, will be indulged. (Northwestern Nat. Ins. Co. v. Woodward, 18 Texas Civ. App., 496; Erie Telegraph Co. v. Grimes, 82 Texas, 94; Patterson v. Frazier, 79 S. W. Rep., 1079.) When this rule is applied to plaintiff's petition, it is apparent that it is good as against a general demurrer. For the intendment is so clear from the allegations that the plaintiff accepted the alleged employment of the defendant that it could hardly be made plainer by a specific allegation of such fact.

The second assignment of error is that "the court erred in permitting plaintiff to testify, over the objections of defendant, that a letter alleged to have been written by defendant to J. D. Cameron was as follows, viz.: 'We have received your letter, also Mr. Campbell's references which are good. You are on the ground, employ him,' as appears more fully by defendant's bill of exceptions No. 1." The bill of exceptions

discloses a number of objections to the testimony, but as the proposition under the assignment embraces only one it alone will be considered. It is: "In order to admit parol evidence of the contents of a letter its genuineness must be established." This proposition involves only the establishment of the genuineness of the letter. If, then, there was sufficient evidence of its genuineness to admit its contents in evidence, the assignment should be overruled, regardless of any other objection that may have been urged upon the trial to the introduction of such testimony, for no other objection is presented for our consideration. The genuineness of a writing may be proved by indirect or circumstantial evidence, as other facts; and in some instances this is the only character of evidence that can be adduced. Before the testimony complained of was introduced, it was shown by the testimony of appellee that the letter in question was written on one of the International Harvester Company's letterheads; that Mr. Cameron, the agent of the company showed him the letter about the 1st of June, 1903; that the signature was the same as that affixed to a letter he had received from the company a few days before and to other letters of the company written to Mr. Boldic, its traveling agent. The defendant and its attorney had been duly notified to produce the letter upon the trial or that secondary evidence would be introduced to prove its contents. It was not denied by defendant or its counsel that such letter had been written or was in their possession. The only challenge to plaintiff was, "You must show the genuineness of such letter before you can prove its contents." These circumstances, when taken in connection with the contents of the letter, fully meet the challenge. Upon the subject of authentication of a writing by its contents, Wigmore on Ev., sec. 2148, observes: "If Doe is the sole person who knows the circumstances of a certain event, and if a letter arrives purporting to be from Doe and stating those circumstances, and the statement appears by subsequent development to be accurate, it would be a simple matter, for the law as well as for common sense, to deem that sufficient evidence of Doe's authorship had been furnished." Campbell was seeking employment from the Company; its agent, Cameron, had written informing the company of the fact; Campbell's references had been sent to the company; a letter is received in reply written from the company's office in Chicago, on one of its letter-heads, bearing the same signature as other letters of the company to its agent, in which it is said, "We have received your letter, also Mr. Campbell's references, which are good." As no one save the company could have received the letter and reference mentioned in the letter received by Cameron and shown to plaintiff, its contents, when taken in connection with other facts, are, under the principle quoted, cogent evidence of its genuineness. We, by no means, wish to be understood as holding that the mere contents of a written communication, purporting to be a particular person's, are of themselves, sufficient evidence of genuineness, for the contrary is the rule.

The third assignment of error is directed against the action of the court in refusing appellant's motion to strike out that part of the testimony of plaintiff in which he testified that J. D. Cameron, about June 1, 1903, received a letter from P. J. Bedell, in which Bedell wrote him, Cameron, that he was in San Antonio, and to employ plaintiff if he,

Cameron, thought he was the right man, and would satisfy defendant. The proposition under the assignment is that "it is error to admit parol evidence of the contents of a written instrument, without proof of the loss, etc., of the original."

Before considering this proposition it will be observed that the general rule is that objections to testimony must be taken when it is offered, and if not made then are considered waived and its admission no ground for a new trial. (Ann Berta Lodge v. Leverton, 42 Texas, 18.) No reason is or can be shown why the objection asserted in the proposition was not interposed when the testimony was offered. However, eliminating "etc." from the proposition (for *et cetera,* which such letters denote, is too indefinite in its specification to permit consideration), the proposition while abstractly correct, is inapplicable to the question and should not be sustained. The evidence shows that P. J. Bedell, by whom the letter purported to be written, was the State agent of defendant with office in Dallas, Texas; that defendant had been notified to produce the letter upon trial; that when last seen it was in Cameron's, defendant's agent's, possession, which was constructively the possession of defendant; that defendant never produced nor disavowed its ability to produce the letter. In view of these facts, it was not necessary to prove its loss in order to prove by parol the contents of the writing. For when an instrument is such as would naturally be in possession of the adverse party or of his agent, and when last seen was in such possession, and the party, after being notified to produce it upon trial, refuses to produce or account for it, secondary evidence is admissible to prove its contents. (Elliott on Ev., sec. 1427, *et seq.*

Upon the trial, plaintiff offered to testify that J. D. Cameron was straightening out and shipping a stock of goods of defendant at San Antonio during the month of May or June, 1903, and employed a man named Scholl for that purpose and that said employe worked three days. The defendant objected to such testimony upon the ground that it was immaterial. The objection was overruled and the testimony admitted. The admission of such testimony over the objection is the basis of the fourth assignment of error. The proposition asserted is that "agency can not be established by the acts and declarations of the alleged agent." This proposition does not fully embody the rule sought to be invoked. It is, stated generally, "Agency can not be proved by the acts or declarations of the supposed agent which are not shown to have been known by the principal." (Cooper v. Sawyer, 73 S. W. Rep., 993.) While mere proof that a person assumed to act as the agent of another is not alone sufficient to establish the agency against the principal, yet, if it is further proved that the alleged principal knew of the acts of the alleged agent and made no objection, or if the acts were so open and notorious that it may be fairly presumed that he knew them, it, together with such further proof, may be sufficient. (Clark & Skyles on Agency, sec. 64.) That J. D. Cameron was an agent of the defendant for some purposes, is shown by defendant's own testimony. Whether it was within the scope of his apparent authority to employ plaintiff, his agency being virtually admitted, would, unless the character of his agency clearly implied or negatived such authority, be a matter for the jury to determine. If, however, he had direct and specific authority from the

defendant to employ the plaintiff, as is indicated by other testimony, it is immaterial whether it was within the scope of his apparent authority to employ him or not. So it would seem, in either event, the testimony complained of in the assignment could not in any way have prejudiced the defendant.

The fifth assignment of error is as follows: "The court erred in sustaining the objection of plaintiff to the answer of the witness, J. W. Bleasdale, to interrogatory number 18, referring to the alleged contract of employment between plaintiff and defendant as follows: 'No such contract ever existed,' said objection being that said answer was the conclusion of the witness." Direct interrogatory number 18, referred to in the assignment, is as follows: "Had you at any time, as such division manager, or has there passed through your hands as such division manager, or is there known to you, any contract of which plaintiff was employed as canvasser, solicitor, or drummer, for any territory operated by the Plano Division of defendant company during the year 1903? If you answer be Yea, state when, under what circumstances, and attach such contract or copy thereof, if such has ever come into your custody and under your control or within your knowledge."

The answer to the interrogatory was: "I had not. There has not been, and there is not such a contract. No such contract ever existed." No objection was sustained to any part of the answer, save the last sentence thereof, which is embodied in the assignment, to which the objection that it was merely a conclusion, was sustained, and, we think, properly. The part of the answer admitted in evidence answered the question, and was evidently all, if not more than, the witness knew about the subject of the injury. The sentence excluded was clearly a conclusion or inference of the witness drawn from what he stated as facts in that part which preceded it. The question is not whether the premise was sufficient to support such statement, but whether it was a conclusion. An inference or conclusion from other facts as premises is, unless it be the opinion of an expert, inadmissible as evidence because the other facts are already or may be brought before the jury whose province it is to deduce conclusions from them. It is apparent to any one acquainted with the principles of logic or right reasoning, that the witness had not stated sufficient facts to form premises for the conclusion that "no such contract ever existed" as was referred to by the interrogatory. If he had, it would have been for the jury to draw the conclusion, not the witness. (Half v. Curtis, 68 Texas, 642.)

The answer of the witness Bleasdale to interrogatory number 22 and to cross interrogatory number 16, the exclusion of which is the basis of the sixth and seventh assignments of error, after stating the customary method of defendant in employing salesmen, consist simply of an argument of the witness, based upon such custom to show that defendant never employed plaintiff as alleged by him, because such employment would have been in violation of defendant's custom. If evidence of such a custom were admissible, the argumentative part of the answer would not be. But proof of a contract *vel non* can not be made by showing the customary method of either party in making contracts of the same character. Customs of a particular corporation or individual, are not, even as to the party who is governed by such customs, as unyielding

and inflexible as cast iron. One can conduct his affairs by rules or not, just as he chooses; but he can govern no one else by them. If the defendant wanted to employ the plaintiff and he wanted to accept such employment, they could, regardless of the customs of either, make a contract in regard to such employment in any way they pleased. We think the answers referred to were properly excluded.

Complaint is made by the tenth assignment of error of the court's sustaining an objection to a part of the answer of defendant's witness P. J. Bedell, to the seventh interrogatory. The entire answer is: "No ratification was ever made by me and have no knowledge of any having been made by any one else. The application for employment by Mr. Campbell was filed away by me, and was never accepted. As stated above, I do not know of any officer or any one accepting or ratifying any contract of employment with Mr. Campbell." The objection made to the answer was that it stated the conclusion of the witness. It was sustained as to the first sentence. All the other part of the answer was read in evidence. If the part of the answer excluded was a statement of a fact within the knowledge of the witness, and not obnoxious to the objection that it was merely a conclusion, it is apparent that the defendant was not prejudiced by its exclusion, because the same fact is embodied in and clearly appears from the remaining part of the answer which was introduced in evidence, as well as in other answers of the witness which were read without objection.

The issue in this case is not whether the witness Bedell ever "contemplated or intended to accept the application for employment (referring to plaintiff's application) for any purpose or on any terms," but whether the plaintiff was employed by defendant. The witness having testified that he never accepted the application, nor employed the plaintiff, it is perfectly immaterial what he contemplated or intended about the matter, and no light would have been cast upon the issue by allowing him to testify that he never contemplated or intended to accept his application for employment for any purpose whatever. Therefore, we overrule the eleventh assignment of error.

What we have said in considering the seventh assignment of error disposes also of the thirteenth, which complains of the court's excluding the following part of the answer of the witness Bedell to cross interrogatory number 13, namely: "All applications for employment for this territory had to come through me and then be sent to the home office, to be accepted before any contract of employment could be made." Such a rule of the company could not affect the plaintiff, nor prevent the defendant from employing him without regard to such rules.

The witness Bedell was asked by cross interrogatory number 15, "How many times during the year 1903 did J. D. Cameron visit Texas, and what were the purposes of his visits, and what did he do for the defendant company while in Texas?" He answered: "Only one time. The purpose of his visit was, as before stated, to compare Chicago records with the records of Dallas and San Antonio offices, and this was what he did for the defendant company." On objection of plaintiff, that the part of the answer stating Cameron's purpose in visiting Texas, and what he did while in San Antonio, was hearsay such portion of the answer was excluded by the court. This ruling is, by the fourteenth assign-

ment denounced as error. The statement subjoined to the proposition under the assignment is too meager to enable us to determine, with any degree of certainty, whether the part of the answer in question is hearsay or not. Not every answer carries with it a test by which it can be determined whether it is hearsay. So, ofttimes matters extrinsic to it must be looked to to determine the question. A moment's thought will demonstrate this to any lawyer and render an allustration of it by example unnecessary. If, however, it should be determined that the answer was not obnoxious to the rule inhibiting the admission of hearsay evidence, it is apparent from the record that the defendant was not prejudiced by its exclusion; for the same witness, in his answers to direct interrogatory number 3, and cross interrogatories numbers 2 and 4, testified in the same words to the same matters, and such answers were without objection read in evidence to the jury.

On cross examination the same witness was asked this question: "Is it not a fact that prior to and subsequent to the employment of plaintiff that J. D. Cameron employed agents and salesmen for defendant company in other places than San Antonio, Texas?" He answered: "Mr. J. D. Cameron had no authority to employ an agent or salesman in any territory in the Plano Division of the International Harvester Company of America, and he had never employed any one therein." Upon objection of plaintiff, that the first part of the answer, relating to Cameron's authority, or, rather, lack of authority to employ agents or salesmen, was hearsay, such part of the answer was excluded. This is the predicate for the fifteenth assignment of error. If not hearsay, the part of the answer was clearly an opinion of the witness and inadmissible. It may have been hearsay, but not necessarily so. The witness before, in answer to direct interrogatory number 4, had testified: "I know of no power vested in Mr. Cameron and recognized none, he being simply bookkeeper sent out from Chicago to compare their records with the records of the Dallas office. I knew of no power or authority that were vested in Mr. Cameron at all." This seems to have been the extent of the witness's information upon the subject of the excluded answer. And it is apparent that the part of the answer complained of was either based upon information received from some source, or an inference deduced from his knowledge of the character of Cameron's employment. If hearsay, the objection to it was good. If an inference, the part of the answer excluded was not competent testimony. In the one event the objection was good, in the other, defendant can not complain.

The answer of Bedell to the twenty-fifth cross interrogatory, to wit: "As answered before, Mr. Cameron had no authority to employ any one in any capacity in the Texas territory," is only an inference; and, upon such ground, was properly excluded. We, therefore, overrule the seventeenth assignment of error. This also disposes of the eighteenth assignment of error; and what we have said in considering the fourteenth assignment disposes of the nineteenth.

As the substance of issues made by pleadings is all that is necessary to be proven, a charge which submits to the jury the substance of the essential issues, made by the pleadings and evidence, necessary to plaintiff's recovery, sufficiently conforms to the rule which requires it to conform to the pleadings. This was done in the part of the charge com-

plained of by the twenty-second assignment of error. It is, therefore, overruled.

The twenty-fifth assignment of error complains of the court's refusal to give defendant's special charge number 1, which is a peremptory instruction to return a verdict in its favor. The charge in question does not, upon its face, disclose the ground upon which it is based. But we gather from the propositions under the assignments and the statements subjoined, it is that the contract sued upon is in violation of the statute of frauds, and, therefore, can not be enforced. It is well settled, that in a suit at law or in equity affected by this statute, the declaration or bill will be sufficient if it allege a contract generally, without stating whether it is in writing or not. (James v. Fulcrod, 5 Texas, 515; Cross v. Everts, 28 Texas, 531; Lewis v. Alexander, 51 Texas, 585; Horn v. Shamblin, 57 Texas, 244; Gonzales v. Chartier, 63 Texas, 37; Robb v. San Antonio St. Ry., 82 Texas, 395; Tensley v. Miles, 26 S. W. Rep., 999; Booher v. Anderson, 86 S. W. Rep., 956; Brown on Statute of Frauds, sec. 505; Reed on Statute of Frauds, secs. 504, 506, 507.) As an obverse corollary to this rule, it would seem that the statute of frauds as a defense must be pleaded, else the plaintiff, whose petition is good against any kind of exception, whose suit is affected by the statute, might be defeated without the defendant's having in any way pleaded the matter which destroys his action. And this corollary seems to be a principle of pleading. (League v. Davis, 53 Texas, 9; Pool v. Wedemeyer, 56 Texas, 299; Patton v. Rucker, 29 Texas, 411; Texas Brewing Co. v. Walters, 43 S. W. Rep., 549.) At least, it is well settled that the defense of the statute of frauds must in some form be specially interposed. See League v. Davis, supra; Texas Brewing Co. v. Walters, 43 S. W. Rep., 549; Booher v. Anderson, 86 S. W. Rep., 957. This may be done by a general demurrer, where the plaintiff's petition, though in all other respects sufficient, shows upon its face that the cause of action stated is within the statute of frauds. (Garner v. Stubblefield, 5 Texas, 561; Murphy v. Stell, 43 Texas, 133; Stovall v. Gardner, 15 Texas Ct. Rep., 756.)

In the case of Hart v. Garcia, 63 S. W. Rep., 922, while correctly decided, the rule may be stated too broadly to be in perfect harmony with other decisions of this State.

In the case at bar the statute of frauds was not in any manner interposed by the defendant in the court below. For it can not be said that its peremptory instruction, which did not disclose for what reason or on what principle it was asked, raised the question. It might have been requested because defendant deemed the evidence wholly insufficient to prove that a contract, either written or verbal, such as alleged was ever entered into by the parties. Certainly the statute of frauds can not be for the first time invoked upon appeal.

The evidence was sufficient to carry the case to the jury upon the issue as to whether the contract sued upon was ever made by the parties. If the agreement upon all the terms of the contract was reached by the parties, as the evidence reasonably tends to show, and nothing remained except to reduce its terms to writing, the contract was complete, there being no evidence that it was not to become effective until reduced to writing, a breach of it by either party, causing damage to the other,

would support an action for such damage. The principles applicable to the test of a completed contract are: "Although the terms of the contract may all be agreed upon, still, if the parties make it a condition to the existence of a contract that the terms agreed upon be reduced to writing, and signed by them, there is no contract until this is done." 1 Add. Cont. (Morgan's ed.), sec. 20. "On the other hand, it is well settled law that, where the parties have assented to all the terms of the contract, the mere reference to a future contract in writing does not negative the existence of the present contract. In other words, if the parties make an agreement which they intend shall be binding from the time it is made, effect will be given it from that time, though they intend it shall be superseded by a more formal written agreement." 2 Whart. Cont., sec. 645; Beach Mod. Cont. Law, sec. 3; Green v. Cole, 103 Mo., 70, 15 S. W. Rep., 317; Lowrey v. Danforth, 69 S. W. Rep. (Mo.), 41.) Clearly the evidence in this case was not such as would authorize the court to withdraw the issue of whether there was a contract between the parties from the jury and peremptorily instruct a verdict upon it for the defendant.

We are not informed why the court was induced to give the charge complained of in the twenty-fourth assignment of error, which is as follows: "The oath administered to each of you when empaneled was that you would a true verdict render according to the law as it may be given you in charge by the court, and to the evidence submitted to you under the rulings of the court. Hence, you are instructed that in considering your verdict you must not receive or consider any testimony other than that now before you." Conditions may have arisen that not only made it proper, but the duty of the court, to give such instruction to the jury. However, whether such conditions obtained or not, we can not see how either party could have been prejudiced by such charge.

Those assignments which complain of the court's overruling defendant's motion for a new trial are not well taken. The judgment is affirmed.

Affirmed.

ON MOTION FOR REHEARING.

It is complained in this motion that we erred in overruling the twenty-second assignment of error which complains of the portion of the charge which submits the issue as to plaintiff's right to recover. The propositions advanced under the assignment are, (1) that a party can only recover upon the contract alleged by him; and (2) that the charge should conform to the pleadings of the parties. In disposing of this assignment in our original opinion, we observed that "as the substance of issues made by pleadings is all that is necessary to be proven, a charge which submits to the jury the substance of the essential issues made by the pleadings and evidence necessary to plaintiff's recovery, sufficiently conforms to the rule which requires it to conform to the pleadings;" and, upon this principle, held the charge not obnoxious to the objections raised by the assignment. A reconsideration of the assignment has not induced us to change our opinion on the question presented. This part of the charge may not, in that it fails to embody the express terms of the contract declared on, be full enough. But, save

an evident clerical error in its date (which could not possibly mislead the jury), it presents the substance of the issues made by the pleadings and evidence. If defendant desired a more specific presentation of the terms of the contract sued upon, it should have prepared and requested a special charge to that end. The defect in the court's charge, should it be regarded as defective, is one of omission only. The charge is good as far as it goes, and is such as to require the request of a special instruction supplying the omission before advantage can be taken of it on appeal. Neither proposition under the assignment presents the question of variance between the contract alleged and proved, and a consideration of such question would be foreign to it and unauthorized. However, the rule seems to be that where evidence is admitted without objection, the question of variance can not be raised upon an instruction to the jury. (Moffatt v. Sydnor, 13 Texas, 628; Houston v. Clute, 19 Texas, 179; First Nat'l Bank of Rockwall v. Stephenson, 82 Texas, 435; Clark v. Reese, 26 Texas Civ. App., 619.)

That the statute of frauds must be in some way specially interposed in the trial court is well settled by the authorities in this State, some of which are cited in our original opinion. And we can perceive no reason for receding from our original opinion that such interposition was not made by requesting a peremptory instruction to find for the defendant, without stating the ground upon which such instruction was asked.

In the case of Cosand v. Bunker, 50 N. W. Rep. (Dak.), 84, it appearing upon the trial that the contract sued on was within the statute of frauds, counsel for defendant requested the court to peremptorily instruct the jury that plaintiff could not recover because the contract was not reduced to writing, the refusal of which being assigned as error, the court in passing upon it held as follows: "We are of the opinion that the refusal to give this instruction was not error, under the evidence in this case. The August agreement as to the surrender of the premises and payment of $500 was given in evidence, and admitted without objection. It was too late, therefore, after the evidence was closed, and the case about to be submitted to the jury, to interpose the objection. Contracts within the statute of frauds, not reduced to writing, are not illegal, but only incapable of being enforced against a defendant without writing —an immunity which the defendant may waive. And this requirement of the statute may be waived by a defendant by a failure to object to parol evidence of a contract that the statute prescribes shall be in writing to be binding upon a party. This question was fully considered and decided by this court in the case of McLaughlin v. Wheeler, 47 N. W. Rep., 816. As bearing upon this question, in addition to the cases cited in that opinion, see Brown, St. Frauds (4th ed.), sec. 135; Montgomery v. Edwards, 46 Vt., 151; Bommer v. American, etc., Manufacturing Co., 81 N. Y., 468; Ames v. Jackson, 115 Mass., 508; Chicago Dock Co. v. Kinzie, 49 Ill., 289; Cahill v. Bigelow, 18 Pick., 369; Huffman v. Ackley, 34 Mo., 277; Houser v. Lamont, 55 Pa. St., 311; Howard v. Sexton, 4 N. Y., 157. It is also contended that it was not necessary for the defendant to plead the statute in this case, in order to avail herself of its protection. We agree with counsel in this proposition. Defend-

ant could, no doubt, have objected to the evidence, and it would have been the duty of the court to exclude it; but, as we have before seen, she could waive the protection of the statute made for her benefit."

While a general denial is sufficient to let in the defense of the statute of frauds (Buhl v. Stephens, 84 Fed. Rep., 922; Busick v. Van Ness, 44 N. J. Eq., 82; Metcalf v. Brandon, 58 Miss., 841; Tatge v. Tatge, 34 Minn., 272; Dunn v. Moore, 3 N. J. Eq., 364; Allen v. Chambers, 4 Ired. Eq., 125; State v. Cape G. Water Works, etc., Co., 74 Mo. App., 273; Boyd v. Paul, 125 Mo., 9; Hackett v. Watts, 138 Mo., 502; Porter v. Citizens' Bank, 73 Mo. App., 513; Wiswell v. Tefft, 5 Kan., 263; Coquillard v. Surdam, 8 Blackf., 24; Suman v. Springate, 67 Ind., 115), the defendant is still obliged to make his defense good by objecting to parol evidence which is sought to be introduced by the plaintiff to prove the contract. (Crough v. Nurge, 44 N. Y. App. Div., 19, 60 N. Y. Sup., 395; Clement v. Gill, 59 Mo. App., 482; Consand v. Bunker, 2 S. Dak., 294.) And a failure to object to parol evidence when it is introduced operates as a waiver of the statute, if not specially pleaded. (Montgomery v. Edwards, 46 Vt., 151, 14 Am. Rep., 618; Pike v. Pike, 69 Vt., 535; Lupean v. Brainard, 20 N. Y. App. Div., 212; Clement v. Gill, supra; Barrett v. Johnson, 77 Hun, 527; Jordan v. Greensboro Furnace Co., 78 Am. St. Rep., 654, 655.)

From the foregoing citation of authorities, it follows that our conclusion to the effect that the statute of frauds was in no manner interposed by the defendant in the court below and can not be for the first time invoked on appeal, expressed in our original opinion, is correct.

We think that the proof was sufficiently certain as to the damages sustained by the plaintiff by reason of the breach of the contract to admit of his recovery. The motion is overruled.

Overruled.

GOODBAR & COMPANY v. N. BLOOM ET UX.

Decided June 13, 1906.

1.—Conditional Sale—Mortgage—Distinction.

In determining whether a conveyance absolute on its face, with a written agreement to reconvey signed by the grantee, is a mortgage or a conditional sale, reference will be had to the enquiry whether the relation of creditor and debtor continues to exist. If it does, it is a mortgage; if it does not, it is a conditional sale. In order to establish that a deed absolute on its face is a mortgage, this fact must be proved with clearness and certainty; and the same rule applies to an instrument which clearly shows upon its face to be a conditional sale.

2.—Same.

Where the defendant was indebted to the plaintiff, and executed to him an absolute deed for a house and lot, reciting therein a consideration of $1,000 in hand paid, and at the same time executed his note to the plaintiff for the balance of such indebtedness, and the plaintiff at the same time gave to the defendant an instrument in writing, styled "Refusal Memorandum," in which it was stipulated that the defendant should have the right to purchase the same premises at any time prior to a certain date named for the same amount of money, with interest, and the payment of said note, the trial court correctly held, in the light of the antecedent facts and the subsequent construction placed by the parties on said instruments, that the transaction was a conditional sale and not a mortgage.

3.—Same—Intention of Parties—Question of Fact.

Whether or not a deed was intended by the parties as an absolute conveyance, or as a mortgage, is ordinarily a question of fact to be decided from all the evidence pertinent to it. The only safe criterion is the intention of the parties, to be ascertained by considering their situation and the surrounding facts, as well as the written memorials of the transaction. The character of the transaction is fixed at the inception of it and what the intention of the parties make it.

Appeal from the District Court of Leon County. Tried below before Hon. Gordon Boone.

Jno. A. Newsom and *Gregg & Brown,* for appellant.—When a debtor executes a deed absolute on its face to his creditor and receives from his creditor an obligation, by the terms of which the creditor obligates himself to reconvey the land upon payment of the debt the transaction is simply to secure the debt and the deed will be declared a mortgage. Moore v. Wills, 69 Texas, 111; Loving v. Milliken, 59 Texas, 425; Brooks v. Young, 60 Texas, 35; Ragland v. Wisrock, 61 Texas, 395.

When parties have embodied the terms of their agreement in writing neither can give oral evidence that they did not mean that, which the writing when properly read, expresses or legally implies, or that they meant something inconsistent therewith. Milliken v. Callahan, 69 Texas, 205; Lott v. Kaiser, 61 Texas, 668; Heffron v. Cunningham, 76 Texas, 319.

Watson & Dashiel, for appellee.—Where a deed absolute on its face is given in consideration of the extinguishment of a pre-existing debt, it is an absolute deed and not a mortgage.

An agreement to reconvey executed by the grantee in a deed absolute upon its face constitutes the transaction a conditional sale. Miller v. Yturria, 7 S. W. Rep., 206; Focke v. Buchanan, 59 S. W. Rep., 820; Kirby v. National Loan & Investment Co., 54 S. W. Rep., 1001.

NEILL, ASSOCIATE JUSTICE.—This suit was brought by Goodbar & Company, a corporation incorporated under the laws of Tennessee, against the appellees, Nathan Bloom and his wife, Theresa, to recover an alleged debt of $1,006.73 claimed by appellant to be due it from appellees, and to reform a certain instrument, in the form of a deed but averred by appellant to be a mortgage made by appellees to secure such indebtedness, by including therein two other lots, which appellant claims were agreed by the parties to be included but were omitted from said instrument either by mistake or fraud of the appellees, and, when so reformed to have such instrument declared a mortgage, and, as such, foreclosed and sold to satisfy the debt sued for.

The appellees answered by a general denial, and plead specially that the instrument averred by appellant to be a mortgage was, as it purported on its face to be, an absolute deed of conveyance made by appellees to appellant in consideration of the cancellation of the alleged debt sued on, and it was so intended and understood by the parties and accepted by appellant with full knowledge of its contents, and that the two lots sought to be included by its reformation were not intended to be embraced in such instrument.

The case was tried by the court without a jury and judgment rendered that the plaintiff Goodbar & Company take nothing by its suit and that defendants Nathan Bloom and wife, Theresa, go hence without day and recover of the plaintiff and sureties on his cost bond all costs of suit.

The facts in this case are shown by evidence which is undisputed and are substantially as follows: On October the 5th, 1903, the appellee, N. Bloom of Buffalo, Texas, being indebted to appellant, a commercial corporation of Memphis, Tennessee, wrote it a letter in which he said: "I have a good hotel comprising five lots, all necessary barns, cisterns, servants' houses, etc., well situated to the depot, and, in fact, from every point of view, a desirable location. This piece of property brings me $25 per month which amounts to $300 per year. I will take for this property $2,000, which is very cheap. The rent would pay you over 10 percent on your money invested, as repairs are not necessary to any great extent. I owe you, and this is the only way that I can see to pay you. My resources are sufficient to meet my liabilities, provided I can collect, but this is utterly impossible as there is nothing made to pay with. You can not understand how serious the outlook is, and I am well aware that you think collections should amount to something. If you can handle this piece of property I can pay you, but if not I am wholly unprepared to make you any proposition." Again, on October 19, 1903, he wrote a letter to appellant in which, after stating his inability to raise money on account of failure of crops, he said: "Now to the point. I have received word from Sanger Bros., to whom I owe $1,403, that they are willing to carry me over, provided I will pay as much as I can, and take only my personal note payable in 1904. They are my largest creditor, excepting you, that is for goods. I pledge you that I will give no man a deed of trust during the year of 1903 to 1904. I am going to do by one and all the same, and make no distinction. I intend to pay you all I can, and all in the same proportion except my little creditors, and I think—and also your Mr. King, that it is best to pay them, so that their mouths will be stopped as they are all more or less restless.

"Now gentlemen I wish your voice on this subject at your earliest opportunity so that we will come to some understanding at an early date. I wish to allay suspense."

The appellant, in reply, on November 3, 1903, wrote Bloom expressing surprise at his not being willing to mortgage his property for the benefit of his creditors, and reminded him that his statement to the Mercantile Agencies included 800 acres of land in his wife's name, was, in part, the basis of his credit, and suggested that it should now be made the basis of security for his debts. In reference to the hotel property, the letter is as follows: "We do not want the hotel property and would not give you $1,000 for it, but we will agree to extend your debt, if you will give us a mortgage on that piece of property. This would put you in no worse light with your other creditors than to sell to us."

Again, on November 10, 1903, appellant wrote Bloom as follows: "Replying to your recent letter in regard to selling us your hotel property, we have to say that we do not want it at any price, because our experience has been that property of similar character has always proved a loss to us. We will, however, make you this proposition: You make us a deed to the property at a consideration of $1,000, and we will carry

you until next fall for the balance of the debt. The deed can go on record, and outside of that record we will give you an obligation that we re-deed to you the property next fall, after you have paid us the balance of the $737 and interest and paid us the $1,000. This we know would simply make it equivalent to a mortgage, but to the outside world, or in other words, to every body except you and us, it would have the appearance of being a bona fide sale.

"If you decline to do this, then we must insist upon your executing a mortgage trust deed upon your 640 acres of land, the hotel property and all other real estate you have, except your homestead, for the benefit of all your creditors. . . . We believe, and have been so advised, that your creditors could hold that real estate as community property, but we do not wish to test that matter by going into the courts, and simply ask you to do what we believe to be fair, just and right with us and your creditors. We do not believe that we could sell the hotel property for over $1,000, which is the reason that we are unwilling to take it at any more than that and then carry the balance of your debt.

"We will also make you another proposition: If you will raise enough to pay us the $737, we will take the hotel property at $1,200, and clean up the entire indebtedness at once."

On November 16, 1903, Bloom wrote the appellant, after some introductory observations, as follows: "I wish to satisfy you, as you have been rather kind to me during this year, therefore I will comply with your letter of the 10th.

"I will have my attorney make out deed to hotel property, and you may send me note for balance, and as soon as you get the deed fixed up you can forward me the obligation, which will grant me the option of redeeming the aforesaid property.

"It is not my desire to ask one and one-half times the value of my land, but since you asked to buy some of it, I simply give you a price.

"I do not wish to be contrary, neither do I wish to be dishonest, but I do not wish to give a trust deed to my property.

"I kindly ask that you make note payable November 1. as that will give me time within which to meet this obligation. Include interest in face of note."

On November 21, 1903, Goodbar & Company wrote to Bloom a letter in reply, which is as follows: "We are in receipt of your letter of the 16th inst. and note your acceptance of our proposition of settlement of your account with us, to give us a deed to the hotel property in question for $1,000 and execute your note payable October 1, 1904, for the balance. In compliance therewith we have this day prepared a statement of your account, together with note due at the above stated time for your signature and sent the same of Mr. Jno. A. Newsom of your town to pass on the title to the property and receive the settlement for us. You will also please deliver to Mr. Newsom the rent notes that you have been carrying thereon.

"We have requested Mr. Newsom to draw up an agreement for our signature giving you an option to re-purchase the property for the same consideration you will convey it to us, upon the prompt payment of the note you are to give us as above stated, and 8 percent interest on the $1,000 from date until paid by November 1, 1904. If we collect rents

in excess of the amount of taxes, insurance and interest on the property, we will refund the same to you. We do not know whether or not Mr. Newsom is your attorney, but he is very highly recommended to us and we have confidence in him to refer the same to him for settlement. We trust you will call to see Mr. Newsom at once and arrange the settlement for we desire to close the same definitely at an early date."

On the same date appellant wrote John A. Newsom, an attorney at law, as follows: "In regard to N. Bloom and his indebtedness to us, we have just arrived at the following settlement with him:

"He has agreed to give us a deed to the hotel property in question for and in consideration of $1,000 and to execute his note due October 1, 1904, for the balance due on his account. With that end in view we hand you a statement of his account to us, together with note for his signature for $800 which please have him to execute in taking a deed to the property. We want you to thoroughly look into the title to the property and if you approve of it, it will be acceptable to us. You will also secure from Bloom the rent notes he has for the property, and have him transfer to us the insurance that he has been carrying thereon.

"In regard to the maturity of the note that he is to give us he is now asking that we make it November 1, but our original proposition was to make it payable October 1, and please govern yourself accordingly. We have agreed with him to convey the property back to him for the same consideration that he has delivered it to us, upon the prompt payment of his note due October 1, 1904, which he is to execute, as above stated, together with 8 percent interest on the $1,000 from date until paid by November 1, 1904. It is also agreed that if we collect rents in excess of the taxes, insurance and interest on the property, we will refund the same to him. We were advised by Mr. Bloom on October 5, last that he had a $25 monthly income from the property and we presume he is deriving the same from it at this time.

"Please draw us an agreement, giving him such option on the property which we will promptly execute upon the receipt of deed and his note. We are anxious to get this matter definitely settled at an early date and please call to see him at once and push it vigorously to a settlement. For your information, we enclose herewith a copy of the letter we have this day written him."

On November 23, 1903, Mr. Newsom, in reply wrote appellant, in substance, that he had had an interview with Mr. Bloom in regard to the matter of settlement and that they were together except on one point, that is, Bloom wanted the note payable November 1, 1904, instead of October 1, as directed; that he (Newsom) had suggested as a compromise that the note be made payable on October 15, and that after considerable begging, Bloom had assented to it; that he had prepared the deed, which he expected Bloom's wife to sign, which he sent appellant for inspection before signing; that Bloom had informed him that the insurance he was carrying on the hotel building had just expired, and that he had not taken rent notes from his present tenant, and that he had rented the property for $25 per month, but had to reduce it to $15, and that he (Bloom) was willing the tenant pay the $15 rent per month when due to him (Newsom) to be sent to appellant, or to collect it and send it him-

self. Newsome closed the letter by asking appellant to advise him as to such matters.

On November 27, 1903, in reply to Newsom's letter appellant wrote him as follows: "We are just in receipt of your letter of the 23d inst. with enclosure of deed to be executed by Nathan Bloom and wife, both of which are carefully noted. You did not make the deed in our favor as a corporation so we have taken the liberty to add the same therein, and with this exception we are willing to accept the deed on your judgment as stated in your letter.

"In regard to the rental of the property and its collection, we think it advisable to let Mr. Bloom continue to look after the same, for it will make him more friendly towards us in this transaction and will keep him in touch with the property. Please say to Mr. Bloom, however, that any contract he makes for the rent of the property, must not extend beyond November 1, 1904, at which time his option to re-purchase it will expire by limitation.

"We note that the insurance has expired on the hotel and you will please take steps to insure it for $1,000 for a period of twelve months and kindly send the policy to us and we will reimburse you. In regard to the maturity of the note, we see that he contended for November 1, but that you compromised the matter by making it mature October 15, which is satisfactory.

"We trust that you will be able to get this matter definitely closed at an early date and awaiting your attention, we are,

Yours truly,
Goodbar & Co., Incorporated.
By W. E. Stansbury.

"Please also look into the taxes for this year—we feel that Mr. Bloom should settle them as the year is so far advanced. Also charge interest on note to October 15, 1904."

The negotiations between the parties culminated on the first day of December, 1903, by Bloom and his wife executing and delivering to Goodbar & Company their general warranty deed, which expresses a consideration of one thousand dollars in hand paid by appellant to appellees, to lots numbers eight, nine and ten in block number twenty-seven of the town of Buffalo in Leon County, Texas, according to map and plat of town, as it appears of record in deed records of Leon County, book "O," page 487; the execution and delivery by N. Bloom to appellant of his promissory note for $802.08 (the remainder of his indebtedness to Goodbar & Company after deducting the $1,000, expressed as the consideration of said deed) payable on October 15, 1904, with interest thereon at the rate of 8 percent from maturity; and the execution on December 3, 1903, by Goodbar & Company to the appellee N. Bloom an agreement in writing, drawn at the same time the deed was by Mr. Newsom, which is as follows:

"REFUSAL MEMORANDUM.

"Between Goodbar & Company, a corporation, incorporated under the laws of Tennessee and doing business in the city of Memphis in said

State, acting by J. M. Goodbar, its president, duly authorized to act in this capacity, and, Nathan Bloom of Buffalo, Leon County, Texas.

"In consideration of the sum of ten dollars to it in hand paid, the receipt of which is hereby acknowledged and for other valuable consideration had and received, it, the said Goodbar & Company (Inc.), does hereby agree to and with said Nathan Bloom, that he shall have the right to purchase from it at any time between this day and date and the 1st of November, A. D. 1904, the following described premises, now belonging to it, with the appurtenances thereto belonging, which premises are described as follows, to wit:

"Lots numbers (8) eight, (9) nine, and (10) ten, in block No. (27) twenty-seven of the town of Buffalo, Leon County, Texas, according to the map and plat of said town as it appears of record in the deed records of Leon County, book "O," page 487, on the following terms, to wit:

"One thousand dollars cash, with interest thereon, from this date at the rate of 8 percent per annum until the said first day of November, A. D. 1904, and upon the further condition that the said N. Bloom shall have paid off and discharged a certain note by him executed and delivered to this company dated December 1, 1903, due October 15, 1904, with interest thereon at the rate of 8 percent from maturity, for the sum of (802.28) eight hundred two and 28-100 dollars. And on notice of his election so to purchase, given to it in writing, by letter mailed to it at Memphis, Tennessee, or served on it personally, it does here agree and bind its assigns and successors to make full, complete and perfect title by, through or under it to said Nathan Bloom his heirs or assigns, and to perfect such title to or under it, and to re-convey to said Nathan Bloom, his heirs or assigns upon his complying with the terms and conditions above set forth and expressed.

"It is understood and agreed that all rents and revenues, collected by this company from this property, in excess of taxes, insurance, interest, etc., the same to be repaid to the said N. Bloom upon his purchasing said property."

A month or two after the execution of these instruments Mr. Newsom took out two fire insurance policies of $500 each on the property, payable to Goodbar & Company, as the absolute owner thereof. After the papers were executed, Bloom, in pursuance of the arrangement made with him at the time, collected for appellant the monthly rent of the property and remitted proceeds to Goodbar & Company until October the 12th, 1904, when he wrote the appellant as follows: "I have by this mail forwarded to Memphis Trust Company draft for amount of $802.28 to cover note given in 1903.

"Relative to the conditional sale of the hotel I would say that I do not care to redeem the hotel as money matters are cramped at present. If you have my note for $1,000, I, of course, would pay it; but since you bargained for the hotel, I had rather it remain as it is now than to go to the trouble to raise $1,000. I am of opinion that you can find a purchaser for this property as it is worth that amount even to-day, though I am not able to pay such a price. In regard to the rent you may get some one to attend to that matter in the future, as I would rather you get some one else. I am sorry that I can not take it off your hands, but there is no chance for me to have the deed made different, therefore

you can destroy the agreement." As stated in this letter, the draft was sent to the Memphis Trust Company, who held the note, in payment and discharge of the indebtedness evidenced by it, and the note, upon receipt of draft, sent back to Bloom. In reply to the above letter, on the 15th of October, 1904, the appellant wrote Bloom as follows: "We are in receipt of your letter of the 12th inst., and note that you have remitted to the Memphis Trust Company in payment of your note which became due this date, which is appreciated.

"We also observe that you do not desire to redeem the hotel property under our agreement with you and shall govern ourselves accordingly. As we understand it, you have rented the property monthly to the tenant now in charge for the consideration of $15 per month. Please give us the name of the parties so that we may correspond with them directly concerning the matter. Thanking you for your courtesy and wishing you much success, we remain, etc."

Mrs. Fannie Stocker was the party who had rented and was occupying the hotel at that time; and, November 1, 1904, the appellant wrote her as follows: "Dear Madam: Please remit to us the monthly rental for the use of the Bloom hotel, as we are now the owners of it. Your prompt attention will be much appreciated."

Bloom, who was a witness in the case, was asked on the trial: "And at the time you made that deed, how about cancelling the $1,000 debt? Did you intend to put up any security for $1,000, or did you intend to pay $1,000?" He answered: "I intended to pay $1,000, which I did, and if I didn't intend to pay it I wouldn't have given a note for $802.20 to cover my indebtedness."

There was no testimony of any officer or agent of appellant upon the issue as to whether the instrument was intended as an absolute deed or a mortgage.

We have stated practically all the testimony bearing upon the question whether the deed to the hotel property was intended by the parties as a conveyance of the title or as a mortgage. This, we take to be a question of fact, ordinarily to be decided by the jury from all the evidence pertinent to it. And, like any other issue whose province is within the domain of the jury, when decided, either by the jury or the court sitting as a jury, such determination of it will not be disturbed upon appeal unless the evidence upon the issue is such that no reasonable mind can reach the same conclusion attained by the jury.

It is true that there are certain principles of law applicable to the issue which must guide the jury in considering the evidence upon which the issue is to be determined. But they are rules of construction rather than principles of substantive law which arises from and attaches to a given state of facts. These principles will be stated, as enunciated in the elementary authorities, pronounced and applied in courts of last resort in other States as well as those of our own. When stated, we shall then apply them to the evidence before us, and, in view of them, determine from it whether any ordinary mind could reach any other conclusion than that found by the trial judge upon the question. If not, then our finding upon the issue of deed or mortgage will simply be an adoption of that of the trial judge.

To determine whether a particular transaction amounts to a mortgage

or to a sale with a contract to repurchase, Mr. Pomeroy states the rule thus: "The criterion is the continued existence of a debt or liability between the parties, so that the conveyance is in reality intended as a security for the debt or indemnity against the liability. If there is an indebtedness or liability between the parties, either a debt existing prior to the conveyance, or a debt arising from a loan made at the time of the conveyance, or from any other cause, and this debt is still left subsisting, not being discharged or satisfied by the conveyance, but the grantor is regarded as still owing and bound to pay it at some future time, so that the payment stipulated for in the agreement to reconvey is in reality the payment of the existing debt, then the whole transaction amounts to a mortgage, whatever language the parties may have used, and whatever stipulations they may have inserted in the instrument. On the contrary, if no such relation whatsoever of debtor and creditor is left subsisting, then the transaction is not a mortgage, but a mere sale and contract of repurchase." (3 Pom. Eq., sec. 1195.)

Mr. Jones thus states the criterion for determining the question: "Whether a conveyance be a mortgage or a conditional sale must be determined by a consideration of the particular circumstances of each case. 'A glance at the numerous adjudications in controversies of this kind will suffice to show that each must be decided in view of the particular circumstances which belong to and mark its character, and that the only safe criterion is the intention of the parties, to be ascertained by considering their situation and the surrounding facts, as well as the written memorials of the transaction.' The intention of the parties is the only true and infallible test, and this intention is to be gathered from the circumstances attending the transaction and the conduct of the parties as well as from the face of the written contract." (Jones on Mort., sec. 258.)

Again, the same author says: "The character of the transaction is fixed at the inception of it, and what the intention of the parties makes it. The form of the transaction and the circumstances attending it are the means of finding out the intention. If it is a mortgage in the beginning, it remains so; and if it was a conditional sale at the start, no lapse of time will make a mortgage of it. . . . If not a security in the beginning, but an absolute sale or a conditional sale, no subsequent event, short of a new agreement between the parties, can convert it into a mortgage. Where an instrument contains the exact terms agreed on by the parties, and expresses their intent and meaning, the fact that they thought it a mortgage, while it was in fact a conditional sale, does not change its character or effect."

"The existence of a debt is the test. If an absolute conveyance be made and accepted in payment of an existing debt, and not merely as security for it, an agreement by the grantee to reconvey the land to the grantor upon receiving a certain sum within a certain time does not create a mortgage, but a conditional sale, and the grantee holds the premises subject only to the right of the grantor to demand a reconveyance according to the terms of the agreement. A debt either pre-existing or created at the time, or contracted to be created, is an essential requisite of a mortgage. An absolute deed delivered in payment of a debt is not converted into a mortgage merely because the grantee therein gives a

contemporaneous stipulation binding him to reconvey, on being reimbursed within an agreed period, an amount equal to the debt and interest thereon. If the conveyance extinguishes the debt, and the parties so intended, so that a plea of payment would bar an action thereon, the transaction will be held an absolute or conditional sale notwithstanding. And so if there was in fact a sale, an agreement by the purchaser to resell the property within a limited time, at the same price, does not convert it into a mortgage. . . . But if the indebtedness be not cancelled, equity will regard the conveyance as a mortgage, whether the grantee so regards it or not. He can not at the same time hold the land absolutely and retain the right to enforce payment of the debt on account of which the conveyance is made. The test, therefore, in cases of this sort, by which to determine whether the conveyance is a sale or a mortgage, is found in the question whether the debt is discharged or not by the conveyance. If in the subsequent transaction of the parties there is no recognition in any way of the relation of debtor and creditor, and the vendee for a considerable period holds possession without paying interest or rent, these facts go to show that there is only an agreement for purchase and not a mortgage." (Jones on Mort., secs. 263, 265, 267.)

For cases from other States illustrative of the application of the principle, that a conveyance absolute in form is not *converted into a mortgage* by a contemporaneous agreement for a resale and purchase, where is was not shown the parties intended to give it that effect, see Hays v. Emerson (Ark.), 87 S. W. Rep., 1027; Gerhard v. Tucker (Mo.), 85 S. W. Rep., 552; Gassert v. Bogk, 1 Law Rep. Ann., 240, and note.

There are many other cases to the same effect but we deem the citation of these, together with those cited in text books quoted from, sufficient to illustrate the principle.

We will turn now to some of the cases from our own courts, which will be found to be in perfect accord with the elementary authorities upon the subject under consideration.

In Alstin v. Cundiff, 52 Texas, 453, it is held "that in determining whether a conveyance absolute on its face, with a written agreement to repurchase signed by the parties, is a mortgage or a conditional sale, reference must be had to the inquiry, whether the relation of creditor and debtor continues to exist. If it does, it is a mortgage; otherwise, a conditional sale. This test is adhered to in Miller v. Yturria, 69 Texas, 549, where after saying that a conveyance, however, which purports to be a sale either absolute or conditional, may be shown to be a mortgage by proving it was intended merely as a security for a debt, it is held that, in order to establish that an absolute deed is intended as a mortgage, it must be proved with clearness and certainty, and that the same rule applies to an instrument which clearly shows upon its face a conditional sale. We will here observe, that this rule as to the character of proof has been enunciated with the same if not greater, emphasis in other jurisdictions. (Hays v. Emerson, 87 S. W. Rep., 1027; Gerhard v. Tucker, 85 S. W. Rep., 552.)

The case of Kirby v. National Loan & Inv., Co., 54 S. W. Rep., 1081, 22 Texas Civ. App., 257, is very similar in its facts to the one at bar. In that case Kirby was indebted to the National Loan & Investment

Company in the sum of $1,500 evidenced by a note which was a lien upon a certain piece of land owned by Kirby. In order to settle said indebtedness Kirby and wife made a deed to the land to the company, in which such indebtedness was recited, reciting as a consideration the discharge of said debt and the payment of $100 cash. The deed of conveyance then recites, "it is the purpose and intention of this instrument to make an absolute and unqualified conveyance of said property and to vest in grantee free, clear and unencumbered title thereto, having no other or further condition attached thereto except the following right to repurchase said property upon the following terms, to wit: The said grantee herein in accepting this instrument gives to the grantors herein, and the grantors herein expressly reserve the right to repurchase said property from said National Loan & Investment Company, its assigns and successors, at any time within three years from this date, at the agreed price of $1,550 cash, conditioned, however, that whereas said grantors have this day leased from grantee, the National Loan & Investment Company of Detroit, Mich., the aforesaid premises for a period of three years at an annual rental of $93, payable semiannually, as evidenced by the notes of said grantors herein, being five in number, four each for the sum of $46.50, due and payable to the order of the National Loan & Investment Company of Detroit, Mich., and due as follows: One on August 1, 1895, one on February 1, 1896, one due on August 1, 1896, one due February 1, 1897, one due August 1, 1897, and on for $93 due February 1, 1898. Now, therefore, if said A. H. Kirby and Alma Kirby shall fail or refuse to pay any one of said notes for a longer period than six months after its maturity (time being the essence of this agreement), then and in that event the option to repurchase this property shall be, and is, forfeited by said A. H. and Alma Kirby; and it is understood that said last maturing note shall also be paid at the expiration of said three years in the event said A. H. and Alma Kirby purchase said property under their right to repurchase herein contained. The said A. H. and Alma Kirby, as a further condition of leasing this property and of their right to repurchase, obligate and bind themselves to keep said property insured for a sum not less than $1,550 at their own cost and expense, making the policy payable to the National Loan & Investment Company as their interests may appear, and further to annually pay the taxes assessed against said property; and a failure to keep said property so insured, or in the event they fail to pay said taxes due thereon as the law requires, then their right to repurchase said property shall and does expire, and is by them forfeited. In the event of a failure to pay any of said notes or taxes, or to keep in force said insurance, as above set forth, within the time set forth, said A. H. Kirby and Alma Kirby agree and concede that their right to repurchase is forfeited, and they agree and consent to surrender immediate possession, peaceably and quietly, to said National Loan & Investment Company; and they further agree to pay to said company for the time they have so occupied said premises the rents due at the time they surrendered possession to said loan company, at the annual rate stated. In the event of the forfeiture of the rights of said A. H. and Alma Kirby to repurchase as hereinbefore stated, or in the event of their failure to pay said purchase price as hereinbefore state, within three years from this date, then the

National Loan & Investment Company shall be, and by these presents are, vested with clear and unincumbered title, being free to own, hold, or in any manner dispose of said property; it being in that event the property of the said National Loan & Investment Company of Detroit, Michigan, free from any right, title, claim, or interest therein or thereto in said A. H. and Alma Kirby. In testimony whereof, witness our hands this the 1st day of February, 1895. A. H. Kirby, Alma Kirby."

It was insisted by the appellant that this instrument upon its face purported to be a mortgage, and not a deed. Upon this insistence it was observed by the court that the intent and purpose of the parties manifested by the instrument to pass title *in praesenti*, subject to the reserved right to repurchase upon the terms named was clear. "The intent and purpose in the execution of an instrument, by all authorities, are of controlling influence in its construction. Every canon of construction has for its object the ascertainment of this intent. It is true, the written expression thereof is not conclusive. The situation of the parties, the attendant circumstances, as well as written memorials may be considered. But when thus ascertained, effect must be given thereto, when not unlawful or opposed to public policy. In determining the effect of the instrument as written, however, we can consider such extraneous facts only as appear therein. Its effect as written is a question of law, to be solved in the first instance by the court. If parol evidence must be resorted to in order to explain the terms or intention of the parties, then the question of construction ceases to be one of law merely, and becomes one of mixed law and fact, to be determined by the jury under appropriate instructions. As we read the instrument before us, no fact is recited that is sufficient to nullify or modify the expressed intent and purpose. The fact that there was a pre-existing debt is insufficient. In such case the question is, was the old debt surrendered or cancelled at the time of the conveyance? To constitute a mortgage, the relation of debtor and creditor must continue to exist. The instrument before us recites, as one of the purposes of its execution, the discharge of such indebtedness, and the consideration therefor, in part, was its cancellation. It may be, as insisted, that the instrument contains a clause of defeasance, within the definition thereof; . . . but if so, it is evident that the clause here under consideration is not of the character that abrogates, rescinds, or gives reverse or non-effect to the title conveyed. It in effect provides that in a given contingency the title and right conveyed may be reacquired by the grantor. If such provision must fix the character of the instrument as a mortgage, then it is evident that no such instrument as a conditional sale can be framed. Such provision is a necessary concomitant of such a sale, and in no view can be construed as inconsistent therewith. Such, we think, must be the conclusion as to each other circumstance relied upon appearing on the face of the instrument before us. When analyzed, we think, without further discussion, that none of the provisions or recitals of the instrument under consideration are inconsistent with the express purpose to constitute an absolute conveyance of title in present, and that therefore, the court correctly refused to construe it as a mortgage." For cases of similar character see Focke v. Buchanan, 59 S. W. Rep., 820; Pumilia v. De George, 74 S. W. Rep., 814.

We will now apply these principles of law to the facts for the purpose of determining whether the evidence is sufficient, in view of the law, to warrant the ultimate conclusion of fact reached by the trial judge that the conveyance of the hotel property by appellees to appellant was an absolute sale conditioned upon the right of appellee to repurchase the property within the time and upon the terms specified in the instrument denominated, "refusal memorandum."

It has been seen that the deed of appellees to appellant, if standing alone and unaffected by the memorandum referred to or any extraneous facts, would be an absolute conveyance of the property. This is shown by its face as clearly as if it bore the expression, "this is intended as an absolute deed and not a mortgage," for it is in the form and very language of an absolute deed conveying a fee simple title to property. It is equally clear, when viewed in the light of the authorities cited, that when this deed and the "refusal memorandum" are read and considered, as they should be, as one instrument, it simply is an absolute conveyance of the property by Bloom to Goodbar & Company, without condition of defeasance, conferring upon the grantor the right to purchase it, at his option, within the time and upon the terms specified. If the intention of parties can be gleaned from the language used by them for the purpose of giving it expression, no canons of construction need be invoked to demonstrate and illustrate that these instruments, when read, taken and considered as one, show the intention of the parties was an absolute sale *in praesenti* of the property, in which the grantor is given the right, if he should elect to exercise it, to purchase the property within a given time upon terms and conditions plainly and unequivocally expressed—an option nothing more nor less, that might have been given as well, for a consideration, had he never owned the property. In view of this express intention, the burden rested upon the appellant to prove with clearness and certainty that the instrument was intended by the parties—not one, but both—as a mortgage. (Miller v. Yturria, supra; Hays v. Emerson, supra; Gerhard v. Tucker, supra.

Do the extraneous facts evince with clearness and certainty or, as for that, reasonable certainty, that the intention of the parties was that the deed to Goodbar & Company should be held as a security for a debt that Bloom owed appellant? If the correspondence between the parties up to the time the final agreement was reached were alone to be considered it would appear that appellant did not desire to purchase or take the land in payment or discharge of the indebtedness of the appellee, but wished to take a deed to the property to secure its payment. If then, the intention of Goodbar & Company, up to that time, could alone determine the character of the transaction, it might be said that the conveyance was clearly proven to be a mortgage. But it is a homely adage that "it takes two to make a trade." In order to do this there must be a drawing together of the minds, a meeting and concurrence of them in the same intention. If the intention existing in one mind is different from that existing in the other, such diverse intentions can never, as long as they exist, meet in agreement and form a contract. It is just as apparent from the correspondence that Bloom did not desire to convey the property in question, or any of his property, as security for the debt he owed appellant as it is that the latter desired him to do so. There

is nothing tending to show a concurrence of intentions by the parties, until November the 16th, when Bloom wrote Goodbar & Company that he would comply with its letter of the 10th. The letter he refers to, as is seen, submits two propositions—one if accepted and acted upon would be tantamount to a mortgage; the other, an absolute sale, with the right given Bloom to repurchase. Let it be assumed *pro hac vice* that it was the first that Bloom had in mind when he wrote that he would comply with appellant's letter, yet it appears from the letter of instruction of November 21, 1903, written by Goodbar & Company to Mr. Newsom, and from another of the same date to appellee, in regard to drawing up papers, that the agreement reached by the parties was, with some minor modifications, just as it is expressed in the papers drawn by said attorney. There was no fraud nor mistake, save as to the failure to include two other lots in the deed, alleged or claimed by the appellant. The appellee makes no such claim, but insists the papers express the agreement. They were drawn by appellant's own attorney, from data which it furnished him for that purpose, and before signed and delivered submitted to appellant for inspection and approval; it interposed no objection, save that the instrument did not state that it was a corporation, but sent the deed back to their attorney for the appellee and his wife to execute and acknowledge; when executed and acknowledged they accepted it and executed the memorandum giving the appellee the right to repurchase. Up to the time the deed was executed, appellee's indebtedness was $1,800; of this indebtedness only $800 remains when the deed is executed for which a note with interest was taken; for this note, it is not and never was contended that the deed was intended as security; the deed nor memorandum says nothing about indebtedness, or security for indebtedness, but expresses a cash consideration of $1,000; no cash was paid. Can any one doubt that this expressed consideration was for that much of the indebtedness as it existed prior to the execution of the deed? or that $1,000 of the indebtedness ceased to exist, having been extinguished by becoming the purchase money? If so, let him consider the action of the parties in regard to the matter afterwards. For it is a rule that if one of two constructions can be placed upon a contract and it has been construed by the parties to it, it will be given by the courts that construction the parties have placed upon it themselves. In the letter of appellant of November 27, 1903, to Mr. Newsom, in which the deed was returned for appellee's signature, Newsom was requested "to say to Mr. Bloom, that any contract he makes for rent of the property must not extend beyond November 1, 1904, at which time his option will expire by limitation." This clearly and unequivocally shows that appellant construed the contract as an absolute sale, with an option on the part of appellee to purchase, which expired on November the first following. Appellant also instructed his agent to insure the property for it; and it was insured, in obedience to the instruction, for the company. Ordinarily the mortgagor of the property is entitled to the rents, the rents for the property, through courtesy, were collected by Bloom and paid to appellant and received by it as its own, without being credited on any debt. On October 12, when Bloom wrote the appellant that he had remitted the money in payment of the note made for the balance of the debt and notified it that he did not wish to redeem the property,

the reply he received from Goodbar & Company, together with the letter it afterwards wrote to Mrs. Stocker, shows clearly that it regarded the hotel property as its own, which is inconsistent with the plea that the conveyance was intended as security for a debt and perfectly consistent with what the deed, in connection with the contemporaneous memorandum, shows upon its face.

So, in any light the transaction is viewed, we conclude that the evidence is sufficient to warrant the trial court in finding as a fact, that an absolute conveyance of the property, with an option to repurchase by the grantor, was the intention of the parties.

As a reformation of the deed was sought as a preliminary relief to having the instrument declared and foreclosed as a mortgage, and in no other event, and it having been determined that appellant is not entitled to the principal relief sought, it follows that it is not entitled to the ancillary relief of reformation in this action.

The judgment is affirmed.

Affirmed.

W. B. PUTNAM v. ST. LOUIS SOUTHWESTERN RAILROAD COMPANY.

Decided June 13, 1906.

Destruction of Crop of Fruit—Measure of Damage.

In an action by a tenant to recover damages for the destruction of a crop of fruit by a fire caused by the negligence of a railway company in the month of January, the measure of damages is the difference between the value of the crop immediately before and immediately after the injury. Although the fruit may not have made its appearance at the time of the fire, it was in some stage of development which was arrested, and the crop thereby destroyed. The same rule applies as in cases of other annual crops.

Appeal from the District Court of Smith County. Tried below before Hon. R. W. Simpson.

A. Morgan Duke, John M. Logan and *McCord & Bullock,* for appellant.—The value of the crop that might have been grown on the land for a specified time can be shown as a basis for damages and the measure of damages usually applied, is that, that gives compensation for loss actually sustained. King v. Griffin, 87 S. W. Rep., 844; Rogers v. McGuffy, 87 S. W. Rep., 817; Rogers v. McGuffy, 74 S. W. Rep., 753; Brincefield v. Allen, 60 S. W. Rep., 1010.

Plaintiff would be entitled to show what the crop of peaches and apples would have reasonably brought had the fire not destroyed the trees (and this regardless of whether the peaches and apples on the trees had, in fact, come into existence) and the cost of cultivation, marketing to be deducted from the amount, and difference is measure of damages, be this called "profit" or not. International & G. N. Ry. Co. v. Pape, 73 Texas. 503; Raywood Rice, Canal and Milling Co. v. Langford Bros., 74 S. W. Rep., 926, and authorities cited under first assigned error.

E. B. Perkins, Marsh & McIlwaine and *J. S. McIlwaine,* for appellee.—The trial court properly sustained appellee's special exceptions; for,

upon the facts appearing from the pleading, the injury complained of was an injury to the freehold, and the measure of damages as laid in appellant's petition was improper and incorrect, the true measure of the lessee's (appellant's) recovery being the difference in the rental value of the premises immediately before and immediately after the injury complained of.

JAMES, CHIEF JUSTICE.—The action was brought by appellant to recover damages for the destruction of fruit trees by a fire, negligently set out by defendant in January, 1904. Plaintiff alleged that he had rented the farm upon which the fruit orchard was situated for one year beginning October 19, 1903; that the peach and apple orchard, at the time he rented it, was in a high and healthy state of cultivation, that he had rented it for the purpose of using and cultivating same and for marketing the fruit which he expected to obtain therefrom during his term, and which was "then growing." That he reasonably expected to and would have made and grown fruit on said trees of the value of $2.50 per tree net and clear of expenses. That the peach and apple crop which was upon said peach and apple trees at the time of the fire and which was killed and destroyed thereby was worth that sum net per tree, and that the trees so destroyed numbered seven hundred, and he prayed for judgment in the sum of $1,750 accordingly.

Defendant answered, by special exception among other things that the measure of damages alleged in plaintiff's petition could not be recovered, the same being defective in stating the incorrect and improper damages under the facts alleged, and that the true measure of damages upon the facts alleged is the difference in the rental value before and after the injury, and because it appeared from the petition that the fire occurred on January 10, 1904, before the crop had reached any stage of maturity.

The court sustained the exceptions and plaintiff declining to amend, the court rendered a judgment of dismissal.

Appellant's propositions are:

1. The value of the crop that might have been grown on the land for a specified time can be shown as a basis for damages and the measure usually applied is that which gives compensation for the loss actually sustained.

2. Plaintiff would be entitled to show what the crop of peaches and apples would have reasonably brought had the fire not destroyed the trees (and this regardless of whether the peaches and apples on the trees had in fact come into existence) and the cost of cultivation and marketing to be deducted from the amount, the difference is the measure of damages, be this called "profit" or not.

Appellant cites King v. Griffin, 87 S. W. Rep., 844; Rogers v. McGuffey, 75 S. W. Rep., 817; Rogers v. McGuffey, 74 S. W. Rep., 753; Brincefield v. Allen, 60 S. W. Rep., 1010; Raywood Canal & Milling Co. v. Langford, 74 S. W. Rep., 926; International & G. N. Ry. v. Pape, 73 Texas, 503. See also San Antonio & A. P. Ry. v. Kiersey, 81 S. W. Rep., 1045. These cases all have reference to annual crops, as distinguished from crops produced by perennial plants upon the land. In Railway v. Pape, the general rule is admitted to be that in the destruc-

tion of a crop the measure of damages is the difference between the value of the crop immediately before and its value immediately after the injury. The former rule was, however, held to be applicable from necessity, an unmatured crop of cotton not being a subject of sale, and therefore without market value.

The petition discloses in effect that the crop of peaches and apples had not approached anything like maturity, if the fruit had made its appearance at all upon the trees. We think, however, it was a matter of common information and hence of judicial knowledge, that at or about the date alleged, there was no fruit whatever upon the trees.

Still, plaintiff alleged that he had rented the place with the orchard for the purpose of cultivating and enjoying the same, and for the purpose of marketing the fruit which he expected to raise from the orchard during his term, and which was then growing. Although the fruit may not have made its appearance in the month of January, when the chances of the year's crop was destroyed, this furnishes no reason for holding as a matter of law that he was not deprived of a valuable crop, that was then in some stage of development.

It was held in Gulf, C. & S. F. Ry. v. Carter, 25 S. W. Rep., 1023, that the mode of measuring the damages which this petition sought to apply was applicable in a case where a crop had been planted but had not come up. In the present case the trees had been placed in a condition for proper production, and nothing remained but for the annual crop to develop. The particular stage of maturity would be immaterial in the case of a crop that is planted annually, and it must be so in the case of a fruit crop produced annually from trees, unless the fact that fruit trees are perenial and constitute a part of the realty, requires a different rule.

If there had been no leasing in this instance and the action had been brought by the owner, who was in the act of producing a crop of fruit from these trees, his damages would arise from, not only the loss of the particular crop, but from the loss of the trees. Arriving at his damages by the rule of difference in value of the realty with the trees and without the trees, would not have afforded him complete redress unless it included the damage he sustained by the loss of the fruit crop then in course of development. He certainly could have waived all other damage and sued alone for the loss done his crop. In our opinion the same rule for the measurement of damages is applicable to a crop that is growing, whether it be from plants annually grown, or from trees or other plants that grow permanently and produce annually. The reasons given in Railway v. Pape (supra) apply as well in both cases.

Petitioner had the property for the year and the crop was his. He had no interest in the permanent injury done the realty. His right extended only to the crop to be grown during that year and his injury was entirely separable from the injury done the owner. Recovery by him with reference to the crop independent of the trees, would not interfere with the right of the owner to the damages done the freehold, and in no way would tend to subject defendant to a double recovery. Appellee insists that plaintiff's measure of damages should have had reference to the rental value of the premises had the trees not been injured and the rental value immediately after the injury. This rule, if it furnished the exclusive or a proper method of arriving at the damages in this class of

cases would doubtless have been applied in the above cases involving the destruction of an ordinary annual crop, because equally applicable in those cases. See Colorado Water Company v. Hartman, 38 Pac. Rep., 62, where that mode of measuring the damages was disapproved in favor of the one that has been approved in this State and the one adopted by the present petition.

We see no substantial reason why plaintiff, a tenant, interested only in the year's crop the growth of which was arrested and destroyed, should not have his damages measured by the rule which obtains in cases of other annual crops.

We conclude the ruling was erroneous and the judgment should be reversed and the cause remanded.

Reversed and remanded.

P. A. McKENZIE ET AL. v. C. E. BARRETT.

Decided June 14, 1906.

1.—Construction of Verdict—Judgment.

In a suit by the owner of a building against a contractor and the surety on his bond for failure to complete said building, the jury returned the following verdict: "We, the jury in this case, find for the plaintiff to the amount asked, namely $902.92, against the defendant bond company, and judgment against the defendant McKenzie in favor of the bond company for like amount, together with $200 attorney's fees." Held, sufficient to support a judgment in favor of plaintiff against both defendants.

2.—Items of Expense—Certificate of Architect.

A building contract stipulated that the amounts expended by the owner, in case of default by the contractor, should be audited and certified by the architect; an itemized account of such expenditures was subscribed by the architect, and the architect testified that he approved and certified each of said items. Held, a sufficient compliance with the requirement of the contract.

3.—Alteration in Written Instrument—Burden of Proof.

The general rule that if, on the production of an instrument in writing, it appears to have been altered, it is incumbent on the party offering it to explain this appearance, is modified by the further rule that if there is no peculiar circumstance of suspicion attached to the altered instrument the alteration is presumed to have been made prior to or contemporaneous with its execution, and in such case the burden of proof is on the party attacking the instrument to show that the alteration was made after its execution.

4.—Same—Charge.

There were several alterations in a contract introduced in evidence by the plaintiff; the court charged the jury to find for defendants if they believed all the alterations were made by the plaintiff after the contract was executed. Held, the failure to charge that if any one of said alterations was so made to find for the defendant was an error of omission, and a special charge supplying the same should have been requested.

5.—Building Contract—Payments—Certificate of Architect.

Where a building contract required the owner of the building to reserve in his hands twenty percent of the estimates of the architect made periodically of the material and labor furnished by the contractor, and also required the owner to pay to the contractor eighty percent of such estimates upon the certificate of the architect, the surety on the contractor's bond is not released by payments in excess of eighty percent of the value of the material and labor furnished by the contractor when such payments are made upon the certificates of the architect

and without knowledge on the part of the owner that they are in excess of the limit fixed by the contract.

ON REHEARING.

6.—Alterations in Contract—Charge—Affirmative Error.

Where there were several alterations in a building contract introduced in evidence by the plaintiff, the failure of the court to charge the jury that if any one of said alterations was made by the plaintiff after said contract was executed, such alteration would avoid the entire contract, would be affirmative error, provided the alteration was material.

Appeal from the District Court of Harris County. Tried below before Hon. Norman G. Kittrell.

W. H. Ward and *E. P. Phelps,* for appellant, McKenzie.—The jury having found by its verdict for plaintiff against the defendant surety company only, it follows that its verdict was in favor of this defendant as between him and the plaintiff. Gulf, C. & S. F. Ry. Co. v. James, 73 Texas, 18.

The contract between plaintiff and McKenzie having fixed the method of determining the amount of expense reasonably incurred by plaintiff for furnishing materials and for finishing the work to be done by said McKenzie thereunder, in the event the work was taken over by plaintiff, by an audit and certificate of the architects, the failure of the plaintiff to produce such an audit and certificate of such expenses entitled the defendant to a verdict and judgment. Kansas City E. & P. Ry. Co. v. Perkins, 88 Texas, 77; Childress v. Smith, 90 Texas, 616.

There was absolutely no proof as to what the labor and materials were or what they were reasonably worth, except the item of $333 for painting, or that they were necessary to be incurred in order to complete defendant's contract. Missouri, Pac. Ry. Co. v. Platzer, 73 Texas, 124; Gulf, C. & S. F. Ry. Co. v. McGowan, 73 Texas, 363; Fordyce v. Beecher, 2 Texas Civ. App., 34; O'Connor v. Smith, 84 Texas, 238; Edloff v. Mason, 79 Texas, 218; Altgelt v. Brister, 57 Texas, 436; Taylor v. Williams, 26 Texas, 583.

This defendant alleged two alterations in the specifications, and the court, by the foregoing charge makes it incumbent on him to establish both alterations, when proof of either alteration, if material, in the opinion of the jury, would have rendered the contract nugatory, and entitled this defendant to a verdict. Miller v. Alexander, 13 Texas, 505; Park v. Glover, 23 Texas, 473; Harper v. Stroud, 41 Texas, 372; Anson on Contracts (2d Am. ed.), star page 327 et seq., and authorities cited.

Hogg, Watkins & Jones, for appellant, Fidelity and Deposit Company of Maryland.—Where the surety signs a bond providing that the owner shall keep and perform all the provisions thereof, as well as of the building contract upon which the bond is based as a condition precedent to a recovery thereon, and where one of such provisions is, that the owner shall not pay to the contractor more than 80 percent of the value of the material and labor wrought into the building, a breach of this provision by the owner releases the surety. Ryan v. Morton, 65 Texas, 258; Sanders v. Hambrick, 16 Texas Civ. App., 461; House v. American

Surety Co., 54 S. W. Rep., 303; United States v. Freel, 186 U. S., 309, and cases cited; Backus v. Archer, 109 Mich., 668; Evans v. Graden, 125 Mo., 77; Taylor v. Jeter, 23 Mo., 244; Law v. East India Co., 4 Vesey, 824; Mundy v. Stevens, 9 C. C. A., 366, 61 Fed. Rep., 77; Tennant v. Fawcett, 94 Texas, 111; Sanger v. Slayden, 7 Texas Civ. App., 609; Borden v. Houston, 2 Texas, 607; McClenney v. Floyd, 3 Texas, 116; Smith v. Doak, 3 Texas, 222; Burke v. Cruger, 8 Texas, 70; Wylie v. Hightower, 74 Texas, 306; Coe v. Nash, 91 Texas, 113; Moroney v. Coombes, 13 Texas Ct. Rep., 527.

"A surety is bound by the terms of his contract, and his liability can not be extended beyond it. If the contract be altered without his consent, whether he sustain injury or the contract be to his advantage, it ceases to be his contract, and with that ceases his obligation." Durrell v. Farwell, 88 Texas, 98, 107; Ryan v. Morton, 65 Texas, 260; Smith v. Montgomery, 3 Texas, 209; Lane v. Scott, 57 Texas, 370; Brandt on Surety, sec. 376 (3d ed.); Robeson v. Roberts, 20 Ind., 155; Mayhen v. Boyd, 5 Md., 102; Watriss v. Pierce, 32 N. H., 560; Cunningham v. Wrenn, 23 Ill., 64; Bethune v. Dozier, 10 Ga., 235.

In a suit on a contract against the principal and surety therein, when the surety alleges an alteration in the contract after its execution, and where the plaintiff offered evidence tending to show no alteration, and the defendant surety offered evidence showing, if true, that such contract was altered, and where the contract showed on its face that the alleged alterations were interlined, it was error for the court to charge the jury that the burden of proof was on the defendant to establish such alteration. Stookbury v. Swan, 85 Texas, 566; Texas & Pac. Ry. v. Geiger, 79 Texas, 13, 21; Western U. Tel. Co. v. Bennett, 1 Texas Civ. App., 560.

Where any suspicion is raised as to the genuineness of altered instruments, the party producing the instrument and claiming under it is bound to remove suspicion by accounting for the alterations. Miller v. Alexander, 13 Texas, 497, 505; Bullock v. Sprowls, 54 S. W. Rep., 657, 661; 1 Greenleaf Ev., sec. 564; Stokes Ev., pp. 500, 501.

Where a defendant pleads two or more material alterations in an instrument it is error to charge the jury that all such alterations must be proved before a defense is made out. London & G. Ins. Co. v. Joy, 64 S. W. Rep., 786.

A verdict in favor of a plaintiff against the surety and failing to find against the principal is indefinite, and is void as to the surety, and not a sufficient basis for any judgment against the surety. Moore v. Moore, 67 Texas, 293-297; Gulf, C. & S. F. v. Hathaway, 75 Texas, 558, 559; Gulf, C. & S. F. Ry. v. Renfro, 69 S. W. Rep., 648.

Andrews, Ball & Streetman, for appellee.—In determining whether a verdict authorizes a judgment upon an issue, the court will look to the pleadings and the charge of the court, and if, under such pleadings and charge of the court, the verdict of the jury necessarily involved a finding upon such issue, a judgment upon said issue is authorized. Pearce v. Bell, 21 Texas, 688, and cases cited. The case of Pearce v. Bell has been cited with approval in the following cases: Tarkington v. Broussard, 51 Texas, 555; Jones v. Ford, 60 Texas, 131; Day v. Cross, 59 Texas,

608; Gulf, C. & S. F. v. James, 73 Texas, 18; St. Louis, A. & T. Ry. Co. v. Henderson, 86 Texas, 309; Texas, E. & C. Co. v. Mitchell, 7 Texas Civ. App., 235; Ablowich v. Greenville Nat. Bank, 67 S. W. Rep., 79.

Under the contract the architect, Glover, was made the sole judge as to whether the work was done in accordance with the contract, and in the absence of fraud his decision was conclusive, and the charge was a proper recognition of this principle. Brin v. McGregor, 45 S. W. Rep., 923; Boettler v. Tendick, 73 Texas, 488; Collier v. Betterton, 29 S. W. Rep., 490; Wright v. Meyer, 25 S. W. Rep., 1122.

Fraud is not presumed. Therefore, if no peculiar circumstances of suspicion attach to an altered instrument, the alteration is supposed to be innocent, to have been made prior to its execution. Rodriguez v. Haynes, 76 Texas, 225; Kansas Mutual Life Ins. Co. v. Coalson, 22 Texas Civ. App., 64.

Fraud not being presumed, and it being necessary for defendant to specially plead the fraudulent alteration of a contract sued upon, the burden of proof would necessarily fall upon the defendant to prove such fraudulent alteration. Kansas, etc., Co. v. Coalson, 22 Texas Civ. App., 64; Gulf, C. & S. F. Ry. Co. v. Sheider, 88 Texas, 152.

Where defendant specially pleads alteration of an instrument, this admits the execution and puts the burden of proving the alteration on the defendant. Irvin v. Garner, 50 Texas, 52; Wells v. Moore, 15 Texas, 522; Muckleroy v. Bethany, 27 Texas, 551.

Where the contract provided that payments are to be made upon the estimate of the architect, such estimate is conclusive upon the parties in the absence of fraud.

The contract in this case having made the estimates of the architect conclusive upon the parties, Barrett was compelled to pay upon his estimates, in the absence of any knowledge that they were incorrect. Bain v. McGregor, 45 S. W. Rep., 923; Boettler v. Tendick, 73 Texas, 488; Collier v. Betterton, 29 S. W. Rep., 490; Wright v. Meyer, 25 S. W. Rep., 1122.

PLEASANTS, ASSOCIATE JUSTICE.—This is a suit by appellee against P. A. McKenzie as principal, and The Fidelity and Deposit Company of Maryland as surety upon a bond executed by defendants to secure the faithful performance by McKenzie of a contract made by him with appellee for the construction of a dwelling house in the city of Houston.

The petition alleges the execution of the contract and bond and that McKenzie abandoned his contract and plaintiff was compelled to complete the same at a cost and expense of $923.92 over and above the amount agreed to be paid by him in said contract.

McKenzie answered by general and special exceptions and general denial, and specially denied that he had voluntarily abandoned the contract. He also pleaded that the plans and specifications had been materially changed without his knowledge and consent after the execution of the contract, and that plaintiff and his architect had conspired to defraud him and refused to allow him to complete the building in accordance with his contract, but demanded of him other and different work from that required by the contract, and for that reason he was com-

pelled to abandon the work. He further pleaded that the certificates issued by the architect for the amounts expended by plaintiff in completing the building were fraudulently made for a much larger amount than was required to complete the work.

The defendant surety company adopted the answer of its codefendant, and further pleaded breaches by plaintiff of the conditions of the bond upon which the suit was brought.

The cause was tried by a jury and upon a verdict in favor of plaintiff judgment was rendered in his favor against both defendants for the sum of $902, with judgment over in favor of the surety company against the defendant McKenzie for a like amount.

The contract sued on was made on January 7, 1903, and under its terms the defendant McKenzie agreed and undertook to construct the buildings therein described according to the plans and specifications attached to said contract, and under the supervision and to the satisfaction of plaintiff's architect, F. S. Glover, for the sum of $3,750. This contract provides that payments may be made to the contractor in installments, "Upon certificates issued once every two weeks to the amount of 80 percent, of the labor and materials in the buildings and the remaining 20 percent, to be retained until the final completion and acceptance of the buildings by the architect, F. S. Glover." In event the contractor should fail to comply with his contract the owner was authorized to take charge of the work and complete same according to the contract, and if the unpaid balance due the contractor at that time should exceed the expense incurred by the owner in completing the work he shall pay such excess to the contractor, but if the cost of completing the work should exceed the balance due under the contract the contractor was bound to pay such excess to the owner. "The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architect whose certificate thereof shall be conclusive upon the parties."

Article 10 of the contract is as follows: "It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials."

The bond executed by the security company contains the following provisions:

"Whereas, said principal has entered into a certain written contract, bearing date the 8th day of January, A. D. 1903, with said owner, to furnish all of the labor, materials and other things requisite, and to do and perform all things contemplated by said contract, which contract, together with all its terms, covenants, conditions, specifications and stipulations, is incorporated herein and made to form a part hereof as fully and amply to all intents and purposes, as if said contract was recited at length herein." . . .

"This bond is executed by the surety upon the following express conditions, which shall be conditions precedent to the right of the owner to recover hereunder:

"The owner shall keep, do and perform each and every, all and singular, the matters and things set forth and specified in said contract to be by the owner kept, done and performed and exclusively at the times and in the manner in said contract specified. . . .

"The said owner shall retain the last payment and reserve due said principal until the complete performance by said principal of all the terms, covenants and conditions of the contract on said principal's part to be performed, and until the expiration of the time within which liens or notices of liens may be filed, by reason of anything done in or towards the performance of said contract, and until the cancellation and discharge of such liens, if any; and said surety shall be notified, in writing, before the last payment shall be made or said reserve paid."

Sometime in April, 1903, McKenzie quit work under the contract and plaintiff took charge of the work and completed the building. The testimony is conflicting upon all of the issues raised by the pleadings, but there is sufficient evidence to sustain the findings of the jury that McKenzie defaulted in his contract and that it cost plaintiff $902 to complete the work over and above the balance due under the contract at the time McKenzie abandoned it; and that said amount was audited and approved by the architect as provided in the contract, and was the necessary and reasonable cost of completing the work in accordance with the contract.

The appellants have filed separate assignments of error and separate briefs.

We shall not discuss the various assignments in detail and unless otherwise stated the questions considered and determined in this opinion are raised by both appellants.

The verdict of the jury is as follows: "We, the jury in this case, find for the plaintiff to the amount asked, namely, $902.92, against the defendant bond company, and judgment against the defendant McKenzie in favor of the bond company for like amount, together with $200 attorney's fees."

Appellants contend that this verdict did not authorize a judgment in favor of plaintiff against McKenzie, and the surety company urges that the judgment against its principal not being authorized by the verdict no valid judgment could be rendered thereon against the surety.

We think the verdict necessarily includes a finding by the jury in favor of plaintiff against McKenzie, and the trial court did not err in so construing it and rendering judgment accordingly. Under the pleadings, evidence and charge of the court no verdict could have been found against the surety company unless the jury found in favor of plaintiff against McKenzie. That the jury intended to find against McKenzie for the amount due plaintiff is evidenced by its finding such amount against him in favor of the surety company. Viewed in the light reflected upon it by the entire record, we think the finding of the jury against McKenzie in favor of the surety company for the amount found to be due the plaintiff clearly evidenced their intention to find said amount against him in favor of plaintiff. (Pearce v. Bell, 21 Texas, 688.)

Our conclusions of fact before stated disposes of the assignments assailing the judgment on the ground that there is no evidence to sustain

the finding that the amounts expended by plaintiff in the completion of the work were audited and certified by the architect, or that such expenditures were reasonable. The itemized account introduced in evidence by the plaintiff was not accompanied by a certificate of the architect, but was subscribed by him, and he swore on the stand that he had approved and certified each of said items. We think this was a substantial compliance with the contract requirement that the amounts so expended should be audited and certified by the architect, and under said provision of the contract such verification of the account was conclusive.

We are also of opinion that the allegations of the petition that the amounts expended by plaintiff in the completion of the building was "necessarily and properly expended therefor," was, in the absence of a special exception, sufficient to admit proof of the reasonableness of such expenditures. Upon this issue the architect testified as follows:

"I completed that contract according to the plans and specifications. I did not do anything in the least in variance to the plans and specifications. I gave certificates for these bills after McKenzie gave over the contract. . . . I had a foreman, and I went out there two or three times a day; of course, I would not neglect my office to stay out there all day; I had to trust a little, of course; I could not tell whether they worked when I wasn't there or not, but the foreman I had was a good man, and I believe yet he was a good man. I got the work done as economically as I could; I had no disposition to do otherwise."

While there is testimony to the effect that the building could have been completed at much less cost, the evidence above quoted is sufficient to sustain the finding of the jury upon this issue, and the point is not made that such finding is so against the preponderance of the evidence as to require this court to set it aside.

The defendants alleged in their answer that the specifications which were made a part of the contract had been changed without their knowledge or consent after the contract was executed by writing in the paragraph relating to painting the words "house" and "barn" between the words "exterior" and "including," and adding to said paragraph the words "on both buildings, the exterior to receive two coats of paint, all colors to be selected by the owner and architect."

There was evidence to the effect that these interlineations and additions to the specifications were made as alleged after the contract was executed and without the knowledge and consent of defendants. Upon this issue, after reciting in his charge the allegations of the petition above mentioned, the court instructed the jury as follows:

"The burden of proof is on the defendants, McKenzie and the bond company, to establish alteration of the specifications after they were executed, and if you find that they have established such alteration by a preponderance of the evidence, and find that they were altered to the extent above set forth, after they had been signed by McKenzie and Barrett, then you will find for the defendants and inquire no further, and you will state by your verdict that you find such alteration to have been a fact. If you do not find the specifications were altered as alleged, then you will proceed to inquire further, guided by the following instructions."

This charge is objected to on the ground that it erroneously placed

the burden upon the defendants to establish the alterations alleged, and further, because it only authorized the jury to find for defendants in event they believed that all of the alterations alleged were made when proof of either of said alleged alterations was sufficient to entitle defendants to a verdict.

The general rule that if on the production of an instrument in writing it appears to have been altered it is incumbent on the party offering it to explain this appearance, is modified by the further rule that if there is no peculiar circumstances of suspicion attached to the altered instrument the alteration is presumed to have been made prior to or contemporaneous with its execution. Under this rule the mere fact that there were interlineations in the instrument would not relieve the defendants of the burden of proving that such interlineations were made after the instrument was executed. The execution of the instrument was not denied by the defendant, and plaintiff did not deny, but admitted, that the interlineations were made by him or by his architect, the only issue raised being whether they were made before or after the contract was executed. We think upon this issue the trial court properly placed the burden upon defendants to prove, as alleged by them, that the interlineations were made after the execution of the contract. (Rodriquez v. Haynes, 76 Texas, 225; Kansas Mut. Life Ins. Co. v. Coalson, 22 Texas Civ. App., 64.)

There was no affirmative error in instructing the jury in effect that if they believed that all of the alterations were made as alleged by the defendants they should find for defendants. That the defendants under such circumstances would be entitled to a verdict is a correct statement of the law so far as it goes. It is equally clear that if any one of the alleged material alterations was made the defendants were entitled to a verdict, but the omission of the court to so instruct the jury can not be complained of in the absence of a request for such instruction. No such request was made by the defendant McKenzie, and his assignment complaining of this charge can not be sustained. The appellant surety company requested such a charge and its assignment of error complaining of the refusal of the court to give the requested instruction must be sustained.

It is urged by appellant surety company that the judgment against it must be reversed because the undisputed evidence shows that the plaintiff had paid the defendant McKenzie more than 80 percent of the work done upon the building at the time he abandoned it, and under the terms of the bond sued on the surety was released from all liability thereon if the plaintiff failed to retain 20 percent of the contract price until the building was completed.

It may be conceded for the sake of argument that more than 80 percent of the value of the work done on the building was paid the contractor, but unless plaintiff knowingly made payments in excess of the 80 percent the surety would not be released. The contract, which was made a part of the bond, required the plaintiff to pay the contractor every two weeks as the work progressed upon certificates of the architect showing the amount due under the contract. The plaintiff and the architect both testified that all payments made were made on certificates furnished by the architect. If by the mistake of the architect, or by collusion between

him and the contractor these certificates were made for more than 80 percent of the value of the work and material placed in the building plaintiff could not be held responsible for such mistake or fraud unless he knew of it at the time he made the payments. The contract required him to pay the amounts certified by the architect to be due, and the provisions of the bond upon which appellant relies to sustain the contention that the payment of more than 80 percent to the contractor prior to the completion of the building would release the surety, recites as one of the conditions upon which the bond was executed, that "the owner shall keep, do and perform, each and every, all and singular, the matters and things set forth and specified in said contract to be by him kept, done and performed and exclusively at the times and in the manner in said contract specified."

There is no provision of the bond which can be construed to mean that if plaintiff in paying the amounts called for in the certificates of the architect, without any knowledge that such certificates were not correct, should make a payment in excess of 80 percent of the value of the work done, the surety upon the bond should be released. The bond does not absolutely require plaintiff not to pay more than the 80 percent, but requires him to pay in accordance with the terms of the contract, and the contract, as we have seen, requires him to pay on the certificate of the architect. We think it clear under the provisions of the contract and bond that the surety would not be released by the payment by plaintiff of more than the 80 percent unless such payment was knowingly made by him. This issue was properly submitted to the jury and the evidence sustains the finding that plaintiff did not knowingly pay the contractor more than 80 percent of the value of the work done by him.

No other questions are presented which require our consideration. The judgment of the court below in favor of plaintiff against appellant McKenzie is affirmed, and the judgment against the surety company is reversed and the cause as to it remanded.

ON REHEARING.

In our opinion heretofore filed in this cause we held that the judgment of the court below against the appellant bond company should be reversed, because of the failure of the court to give the jury an instruction requested by said appellant to the effect that if they believed from the evidence that either of the alterations claimed by the defendants to have been made in the contract after its execution and without their knowledge or consent were so made, that such alterations were material and they should find for the defendant bond company.

The paragraph of the contract alleged to have been altered is as follows:

"Painting: The exterior of building to be painted over with two good heavy coats of paint composed of pure white lead, zinc and raw linseed oil in such colors as will be directed by the architect. This includes all finish woodwork on the exterior (house and barn) including porch floors above and below and all galvanized iron and tin work (on both buildings, the interior to receive two coats of paint, all colors to be selected by the owner and architect.)"

This clause, according to the contention of appellants, was written with a typewriter and the alterations hereafter stated were made with pen and ink and were alleged to have been fraudulently made.

The alterations alleged were the insertion of the words "house and barn" between the words "exterior" and "including," and in adding the words "on both buildings, the exterior to receive two coats of paint, all colors to be selected by owner and architect."

The motion for rehearing filed by appellee points out the following paragraph of the contract which is not charged by the defendants to have been altered:

"Fencing: Build 294 ft. of 3″ 6″ picket fence, same to have 4″ x 6″ all heart cypress post, 2″ x 4″ rail, 7/8″ x 10″ base, with 2″ water table, 1¼″ x 1¼″ square pickets, and clover leaf mould. All put up and given two coats of paint. Build 238 feet of 5 feet board fence 4″ x 6″ cypress posts, 2″ x 4″ rail, 7/8″ x 10″ plank, with 10″ base at bottom. All to be painted two coats of paint composed of white lead and linseed oil, same as barn and main building."

We think it clearly appears from this paragraph that the contract required the painting of the barn, and therefore the insertion of the words "house and barn" in the paragraph relating to painting was not a material alteration and the requested charge was properly refused.

We have carefully considered the motions for rehearing filed by both appellants and adhere to our former conclusions upon the points presented by said motions, except that we are inclined to the opinion that if the alleged alterations in the contract had been shown to be material the charge of the court submitting that issue would have been affirmative error, which would entitle appellant McKenzie to a reversal of the judgment.

Having found, however, that the alleged alterations were not material, there is no error in the charge of which appellants can complain and their motions for rehearing are overruled.

The motion of appellee for rehearing is granted, and our former order reversing the judgment against the appellant bond company is set aside and it is now ordered that the judgment of the court below against both appellants be affirmed.

Affirmed.

Application for writ of error dismissed.

W. E. WATKINS ET AL. v. E. A. BLOUNT ET AL.

Decided June 14, 1906.

Construction of Will—Deceased Devisee—Brothers and Sisters of Half Blood.

A testator executed the following will: "I do hereby devise and bequeath, after the payment of my debts, to my dear brothers and sisters equally, share and share alike, all my estate, real and personal, whatsoever and wheresoever." Held, (1) that the heirs of brothers who died before the will was made take nothing under said will; (2) that the heirs of a sister who died before the testator take nothing, and (3) that the words "brothers" and "sisters" includes brothers and sisters of the half blood.

Appeal from the District Court of Nacogdoches County. Tried below before Hon. James I. Perkins.

E. B. Lewis, for appellants.

Blount & Garrison and *Ingram, Middlebrook & Hodges*, for appellees. —Cited: *In re* Wells, 113 New York, 396, 10 Am. St. Rep., 457.

GILL, CHIEF JUSTICE.—We adopt the following statement from appellants' brief: This suit was brought by plaintiffs against defendants E. A. Blount, Keith Lumber Company, Hayward Lumber Company and Mollie I. Noble, to partition between plaintiffs and defendants a tract of land of 640 acres patented to S. M. Noble and located in Nacogdoches County. Other defendants were made parties by cross bills filed by defendants on warranties of their vendors. The court rendered judgment against plaintiffs and for defendants.

S. M. Noble, being a single man and having never married, went into the Confederate army early in the spring of 1862. On the 28th of March, 1862, he made his will by which he disposed of his property as follows: "I do hereby devise and bequeath, after the payment of my debts, to my dear brothers and sisters equally, share and share alike, all my estate, real and personal, whatsoever and wheresoever." He appointed James H. Starr independent executor. S. M. Noble had a brother and sister who died before he made his will without leaving issue. He had two brothers who died before he made his will, one in 1854 and one in 1859, both of whom left issue, and they are plaintiffs in this suit. At the time he made his will he had living two brothers and two sisters of the whole blood, and two brothers of the half blood. The brothers of the half blood were the children of his father by his last wife. S. M. Noble, the testator, was killed in the battle of Mansfield, La., on the 8th day of April, 1864. He left surviving him two brothers and one sister of the whole blood and two brothers of the half blood; one of the sisters having died on April 1, 1863, leaving issue, and they are plaintiffs herein. The will was duly probated in the County Court of Nacogdoches County in November, 1864. The independent executor, on June 4, 1870, delivered all the estate, both real and personal, remaining undisposed of by him, to the two brothers and one sister of the whole blood living at the death of the testator, to wit: Mrs. A. D. McAnulty, J. M. Noble and Sim. E. Noble. Plaintiffs and defendants both claimed through the will, the plaintiffs as follows: J. M. Noble, brother of the half blood now living and plaintiff herein. The other plaintiffs are the heirs of the sister who died April 1, 1863; the heirs of the two brothers who died before the execution of the will, and the heirs of the half brother who died in 1875. The defendants claim under mesne conveyances from the two brothers and one sister of the whole blood living at the time of the death of the testator, and to whom the estate was delivered by the executor.

The trial court adopted the view that only the brothers and sister of the whole blood living at the date of the death of the testator could take under the terms of the will, and as the defendants are holding and claiming under them he rendered judgment accordingly.

The judgment is assailed by proper assignments of error which present the questions we will hereinafter discuss.

J. M. Noble, Sim. E. Noble and Mrs. A. D. McAnulty were brothers and sister of the whole blood and were alive at the testator's death.

Mrs. Melvina K. Watkins was a sister of the whole blood and died about one year after the execution of the will, but before the testator died. She left heirs who are parties plaintiff.

George M. and Jimison Noble were brothers of the whole blood and died leaving issue before the execution of the will. Their heirs are parties plaintiff.

Morgan and Mack Noble were brothers of the half blood and were both alive at the date of the execution of the will. Mack is still living and is a party plaintiff. Morgan died about ten years after the probate of the will without issue. The other plaintiffs claim in part as heirs of him.

The questions which arise are:

1. Do the children of the brothers who died before the will was made take under its terms?

2. Do the heirs of Mrs. Watkins who died after the execution of the will, but before the testator, come within its provisions?

3. Can the brothers of the half blood be numbered among the devisees?

As to the first question, we are of opinion that the children of the brothers whose death preceded the date of the will, can not by any fair construction be held to come within its terms.

As to the second question the common law rule seems to be well settled that when the death of the devisee under such a will as the one in question precedes the death of the testator the devise lapses. (In re Wells, 10 Am. St. Rep., 457; See 18 Am. & Eng. Ency. of Law, 748, where many authorities are collated; 2 Redfield on Wills, p. 10.)

Appellants contend, however, that the rule insofar as it may be applied in this State is abrogated by article 5347 of the Revised Statutes of this State. The article cited applies alone to lineal descendants of the testator, and has no application to devisees whose relationship is collateral.

We conclude therefore that the children of Mrs. Watkins can not take under the will and that the share of the estate which she would have taken had she outlived the testator passed under the will to those who were alive and came within its terms at the date of the testator's death. (30 Am. & Eng. Ency. of Law, p. 718.)

The third question must be determined in the affirmative. The word brothers includes brothers of the half blood. (4 Am. & Eng. Ency. of Law, p. 990; 2 Redfield on Wills, p. 30.)

From these conclusions it follows that the heirs of the brothers whose deaths preceded the will can not take. That the heirs of the sister who died before the testator can not take. That the court erred in excluding the plaintiff brother of the half blood, and in excluding the claim of him and the other plaintiffs to heirship to the share of the brother of the half blood who died in 1875 without issue. His share would go to his heirs under the laws of descent and distribution.

The judgment is reversed and the cause remanded.

Reversed and remanded.

MANHATTAN LIQUOR COMPANY v. JOSEPH A. MAGNUS & COMPANY.

Decided June 14, 1906.

Corporation—Agent—Authority.

General managers of corporations have only such implied powers as are either necessarily incident to the exercise of their general authority, or such as are customarily exercised by general managers of like concerns. If the act by which the corporation is sought to be bound is out of the usual course of business of the concern, those dealing with the agent are bound to enquire as to the authority of the agent, or deal with him otherwise at their peril. Facts considered, and held that a corporation was not bound by the act of its general manager.

Appeal from the County Court of Jefferson County. Tried below before Hon. D. P. Wheat.

Greer & Minor and *W. E. Miller,* for appellant.—The secretary and treasurer and general manager of a corporation has no authority by virtue of his official position to make or endorse the promissory notes of the corporation. Such authority must be conferred upon him expressly or impliedly by permitting him to exercise such authority. Fitzhugh v. Franco-Texas Land Co., 81 Texas, 311; New York Iron Mine v. Negaumee Bank, 39 Mich., 648; Merchants National Bank v. Detroit Works, 68 Mich., 620; Craft v. South Boston R. Co., 150 Mass., 207; City Ry. Co. v. First Nat. Bank (Ark.), 34 S. W. Rep., 89.

A private corporation incorporated under the general incorporation laws of Texas for the purpose of engaging in the retail liquor business has no power or authority to bind itself to pay the debt of another by making or endorsing promissory notes for the accommodation of another. South Texas National Bank v. LaGrange Oil-Mill Co., 40 S. W. Rep. (Texas), 328; Northside Railroad Company v. Worthington, 88 Texas, 570; Park Hotel Co. v. Fourth National Bank, 86 Fed. Rep., 742; Humbolt Mining Co. v. American Mfg. Co., 62 Fed. Rep., 356.

The evidence conclusively established the fact that Sol Chan individually, and not the Manhattan Liquor Company, bought Miller's saloon, and that appellant had no interest therein.

Crook & Harris, for appellee.—When the statute allows a corporation to borrow money and execute negotiable notes and requires it to have its principal office in this State, a director, who is also a stockholder, secretary and treasurer of the corporation, its general manager and only agent or officer in the State of Texas, where it kept its principal and only place of business, who bought and sold goods for the corporation and bought on credit in the name of the corporation, paid for the goods out of the funds of the corporation by its checks executed in the name of the corporation by himself as secretary and treasurer, and under the further facts and circumstances of this case, had the implied power to execute promissory notes of the corporation in payment of goods purchased by the corporation, or by himself in the regular line of his duties. Collins v. Cooper, 65 Texas, 461; Flewellen v. Mittenthal, 38 S. W. Rep., 235; Miller v. McDannell, 1 U. C., 259; Texas, etc., Oil Co. v. National Oil Co., 40 S. W. Rep., 159; Pullman v. Nelson, 22 Texas Civ. App., 228; Sparks v. Dispatch Transfer Co., 15 S. W. Rep., 418; Henderson v. San

Antonio & M. G. R. R. Co., 17 Texas, 560; National Bank of Jefferson v. Goolsby, 12 Texas Civ. App., 367; Fort Worth Publishing Co. v. Hitson, 80 Texas, 235; Emerson v. Skidmore, 7 Texas Civ. App., 646; Hamm v. Drew, 83 Texas, 81; Brownwood Ice Co. v. York Mfg. Co., 37 S. W. Rep., 339; Revised Statutes, articles 673, 661, 653; Merchants' Bank v. State Bank, 10 Wall., 604; Merchants' Bank v. Central Bank, 44 Am. Dec., 665; McDermott v. Jackson, 97 Wis., 64; Grommes v. Sullivan, 26 C. C. A., 320 (81 Fed. Rep., 45); Sparks v. Despatch Trans. Co., 12 Law Rep. Ann., 718; Glidden v. Interstate National Bank, 16 C. C. A., 543; Chemical National Bank v. Armstrong, 8 C. C. A., 157; Merchants' National Bank v. Citizens' Gas Co., 159 Mass., 505 (38 Am. St. Rep., 453); Moore v. Gans Mfg. Co., 20 S. W. Rep., 976 (Mo.); Jones v. Williams, 61 Am. St. Rep., 445 (Mo.); Sinclair v. Rutledge, 95 Am. St. Rep., 968; Monument Bank v. Globe Works, 101 Mass., 57 (3 Am. Rep., 323); Taylor's Private Corporations, sec. 205, and cases there cited, and sec. 207; Randolph on Commercial Paper, sec. 370; 10 Cyc., 925; 10 Cyc., 940-g; Scofield v. Parlin & Orendorff, 10 C. C. A., 84.

There is a conflict among the authorities upon the question of validity of the contract of a corporation when made in excess of its powers, but when the contract is executed and the corporation has received the benefit, the weight of authority seems to be that the corporation shall be estopped to deny its authority to make it, and such is the well settled doctrine in this State. Texas W. R. R. Co. v. Gentry, 69 Texas, 635.

The preponderance of the evidence did not show that appellant did not buy Miller's saloon, nor derive any benefit from said purchase, but on the contrary the undisputed evidence showed that appellant did derive benefit from said purchase, and the great preponderance of the evidence showed that appellant bought the Stag Saloon from Miller and that Chan did not; the declarations and acts of Chan, especially when not objected to, were sufficient to establish these facts in favor of appellees. Texas, etc., Oil Co. v. National Oil Co., 40 S. W. Rep., 159; Pullman v. Nelson, 22 Texas Civ. App., 228; Taylor on Private Corporations, sec. 210 and authorities there cited; Houston, E. & W. T. R. R. Co. v. Campbell, 91 Texas, 551; Western Union v. Bennett, 1 Texas Civ. Apps., 558; Brown v. Perez, 79 Texas, 157; Anvil Mining Co. v. Humble, 153 U. S., 548; Adams Express Co. v. Harris (Ind.), 7 Law Rep. Ann., 214 (16 Am. St. Rep., 315); Cochecho National Bank v. Haskell, 51 N. H., 116 (12 Am. Rep., 67); Hall v. Union Central Fire Ins. Co., 23 Wash., 610 (83 Am. St. Rep., 844); III Enc. of. Ev., 638, sec. 3.

GILL, CHIEF JUSTICE.—This suit was brought by Joseph A. Magnus & Co., a partnership, to recover of the Manhattan Liquor Co., a corporation, the sum of $417 evidenced by a promissory note signed by Sol Chan and purporting to be endorsed by the defendant company. The plaintiffs sought to hold the defendant liable as an original maker of the note.

The liquor company filed a plea of *non est factum,* and defended upon these grounds:

1. That the note was executed by Chan for his own personal ends, and the company could in no event be held as the accommodation endorser of another's paper.

2. If Chan pretended that the transaction was the act of and for the

benefit of the liquor company, the plaintiffs had notice that the pretense was false, or else were put upon inquiry which if diligently pursued would have brought such knowledge home to them; and

3. That the purchase, in consummation of which the note was given, was made by Chan without authority of the liquor company, either express or implied, and was not within the apparent authority of Chan as general manager of defendant.

A trial to the court without a jury resulted in a judgment for the plaintiff. The defendant has appealed and renews its contention here.

The general history of the transaction as disclosed by the record may be summarized as follows:

The Manhattan Liquor Company is a Texas corporation organized for the purpose of buying and selling liquors and cigars at retail in the city of Beaumont. Its home office and place of business was at Beaumont, Texas, where it conducted a retail liquor house known as the Manhattan saloon under the management of one Sol Chan. The company came to be organized under the following circumstances. Sol Chan was in financial straits and out of employment. He had a wealthy friend in New Orleans, La., name Sig Kohlman, to whom he applied for aid. Kohlman was willing to aid him but did not care to risk his entire fortune in so doing. He therefore conceived the plan of organizing the corporation in question. Kohlman and his brother were the principal stockholders. They continued to reside in New Orleans. Chan and Myrick, the other stockholders, resided in Beaumont. Sig Kohlman was made president. Myrick was one of the directors. Chan was a member of the directory. Was secretary and treasurer and general manager and was the company's sole official representative in this State. The company, in furtherance of its purposes, established the Manhattan Saloon and placed Chan in charge. He proceeded to conduct it, buying the necessary stock from time to time either for cash or on short credit and paying for it by checks upon the company's funds consisting of receipts from the business, which he deposited in a local bank to the company's credit.

J. A. Miller & Co. owned and were conducting the Stag Saloon in Beaumont. They owed to Magnus & Co. on their stock of wines, liquors and cigars, $1,251. On the 19th day of June, 1903, Joseph A. Magnus & Co. received at their place of business in Cincinnati, Ohio, the following telegram addressed to them:

"Negotiations to buy Miller place. Can we owe you his accounts? Wire.

(Signed) Manhattan Liquor Co."

They knew that Sig Kohlman was largely interested in the Manhattan Company and, being aware of his financial standing, decided to accept the offer and release Miller. They therefore wired their acceptance and confirmed it by letter addressed to the Manhattan Liquor Co., at Beaumont. They promptly sent their agent, Louis Ochs, to close the deal. When he arrived at Beaumont he learned that Chan had sent the telegram and received the letter, and that Chan was the Manhattan Company's sole official representative in Texas. He proceeded to close the deal with Chan personally acting for the Manhattan Company, without inquiry as

to whether Chan had authority from his directory to make the purchase, and seems to have acted under the belief that the transaction came within Chan's general power. The company had not held Chan out as having such power, this being the only transaction of the kind that Chan had ever undertaken. As a matter of fact Chan had not been so authorized.

When Ochs arrived in Beaumont Chan had completed his arrangements with Miller and Company and nothing remained to be done but to assume the debts due Magnus & Co. This was to be arranged by execution on the part of the Manhattan Company of three notes for $417 each, payable to Magnus & Co., with interest, due respectively August 21, October 22 and December 21, 1903. Ochs prepared the notes and handed them to Chan for execution. When they were returned to Ochs he discovered that Chan had signed them individually. When he protested that he had agreed only to accept the notes of the Manhattan Company Chan told him to look on the back. He did so and found that Chan had endorsed the company's name on the back of each note. Upon Chan's assurance that it was "the same thing" he accepted them, but his suspicions were aroused. Chan, perceiving this, took him to the Stag Saloon and, still protesting that the two concerns were the same, took a case of liquor from the Stag stock, sent it to the Manhattan bar and then, opening a bottle, drank from it. Ochs afterwards saw a barrel of goods in the Manhattan stock which he believed to have been sold to Miller Brothers by Magnus & Co. Upon this evidence he inquired no further but accepted the notes and released Miller brothers. The first note was paid upon presentation, by whom it does not appear. The note due December 21 was assigned to the German National Bank. The one due October 22 is the basis of this suit. Thus far the evidence is undisputed.

The fact findings of the trial court are lengthy and for the purposes of this opinion need not be set out in full.

He found, among other things, that Chan did not buy the Stag Saloon for himself but for the Manhattan Company, and that the notes were signed by Chan with the endorsement of the liquor company in order to keep the affairs of the two concerns distinct and separate.

This finding is assailed as without sufficient support in the evidence, and we think the assignment is meritorious. The only evidence remotely tending to sustain the finding are the acts and declarations of Chan at the time of the execution of the notes, and these, in the light of the other evidence, are utterly refuted. Plaintiff's witness, Hegele, testified on cross-examination that Chan and Miller told him at the time that Chan had bought the Stag Saloon. That he conducted it as his own from the date of the purchase until October. That witness sold Chan goods on his individual account for use in the Stag Saloon and that witness never heard of the Manhattan Company owning or claiming it. Tippett's testimony is equally strong upon the point. It was also shown without dispute that in October Chan was adjudged a bankrupt, and Tippett, the trustee in bankruptcy, took charge of the Stag stock as the individual property of Chan and administered it as such.

These facts and the individual form which the notes assumed leave practically no doubt upon this record that Chan made the purchase for himself and endorsed the notes in fraud of both Magnus & Co. and the appellant. It is proper to note in this connection that the appellee

objected to the introduction of the declarations of Chan and Miller to the effect that Chan had purchased the Stag Saloon, but the objection was overruled and there is no cross-assignment. The evidence, for the purposes of this appeal, must be regarded as equally effective as if the testimony was not hearsay. It is also worthy of remark that counsel for appellants in open court stated that counsel for appellee had prepared the bill of sale from Miller & Co. and he was notified to produce it. The reply was not that counsel for appellee had not prepared it, but that he did not have it in his possession. Neither Chan nor Miller were called as witnesses. The contents of the bill of sale were not disclosed. The nature of the transfer of the Miller license was not shown, nor was it shown in what name the retail liquor dealer's bond for the Stag Saloon was executed. We are unable to perceive why these sources of information on this issue were ignored by counsel for both sides, but, as will be hereafter shown, the burden was on appellee to show that the Stag was purchased for and run in the name of the liquor company, in order to sustain this judgment, hence the failure to draw on these sources of proof operated to the detriment of appellees.

Counsel for appellees seek to sustain the judgment on the finding of the trial judge that if the fact conclusion be wrong that the "Stag" was purchased for the liquor company, nevertheless Chan pretended to Ochs that he was so purchasing it, and as the act was within the apparent authority of Chan the liquor company is bound by estoppel. Unless this contention is sound the judgment must be reversed.

The proposition depends primarily upon the result of the inquiry whether the purchase of the Stag Saloon and the assumption of the debts of that concern was within the apparent authority of Chan as secretary-treasurer and general manager of the liquor company and its sole representative in this State. We have no difficulty in concluding that within its charter or power the corporation could have established and conducted more than one retail liquor house in the city of Beaumont, and to this end may have bought out a rival saloon and conducted it. But it does not follow that Chan, as its general manager, could, under his general authority as such and in the absence of express authority from its directory, purchase and conduct another and distinct establishment from the one already established and then being conducted under his management. To so hold would be to clothe one officer of the concern with powers which were manifestly not intended to be conferred by the company when he was appointed, or at any subsequent time. If the act in question could properly be held to be within his general powers it would follow that he could execute the bond for the company thereby imposing its heavy penalties and obligations.

If he could buy out Miller & Company he could under the same authority purchase every other saloon in Beaumont, and for a like reason burden the company with as many additional bonds and obligations. He could, with equal reason, close out the Manhattan bar in bulk, and this though the expressed corporate purpose was to conduct a retail liquor business in Beaumont.

We think these radical consequences of such a holding render its unsoundness too plain to require extended discussion. It would amount

to a holding that the directory by appointing him manager had abdicated all their own powers.

It is doubtless true that a general manager of a corporation may do every necessary, proper, or customary thing in furtherance of the company's established business, but the power to buy and establish another and distinct business would clearly have to be expressly conferred. (Sparks v. Dispatch Trans. Co., 12 Law Rep. Ann., 715; Thompson on Corp., vol. 4, par. 4877; Tres Palacios Rice & Irr. Co. v. Eidman, 14 Texas Ct. Rep., 852.)

General managers of corporations such as the one in question have such implied powers, and only such, as are either necessarily incident to the exercise of their general authority, or such as are customarily exercised by the general managers of like concerns. (4 Thompson on Corp., sec. 4877.) If the act by which the corporation is sought to be bound is out of the usual course of business of the concern those dealing with the agent are bound to enquire as to the authority of the agent and deal with him, otherwise at their peril. (4 Thompson on Corp., sec. 4887; Franco-Texan Land Co. v. McCormick, 85 Texas, 421.)

In Collins v. Cooper, 65 Texas, 461, cited by appellees, the general manager of a mercantile partnership, with general authority to conduct it as he thought best, borrowed money to aid in the conduct of the established business. The partnership was held liable for the debt. In disposing of the appeal Justice Stayton laid down the rule that in order to ascertain the powers which are to be implied from the direct or principal authority conferred in general terms on an agent to whom, as sole manager, had been intrusted the conduct of a large mercantile business, it is not only proper but necessary to consider the character of the business, the manner in which it is usual to carry on such business and, where the agency has continued for a long time, the manner in which the principal business was conducted.

The judgment against the principals was affirmed because the application of this rule disclosed that in the conduct of enterprises of such a nature it was usual and necessary to borrow money, and that in the particular case the agent had done so many times before.

By pursuing a like inquiry in the case before us it appears that the purchase of a rival business in its entirety and its conduct as a separate establishment was an extraordinary and unusual transaction and one that Chan had not undertaken before. It was not in any sense necessary to the conduct of the Manhattan Saloon, nor were the Miller & Company goods purchased for use in the Manhattan bar. That it was to be conducted as a separate concern was known to Ochs and his principals, and they so dealt with it afterwards. The case of Flewellen v. Mittenthal, 38 S. W. Rep., 235, is in no way applicable, for it decides no more than that one having authority to use another's name in the conduct of the saloon business may bind him by the execution of a note to secure money to pay for the saloon license. The license was necessary to the conduct of the business which he had the general authority to conduct in his principal's name. So in this case, Chan doubtless had the power to incur debts in the conduct of the Manhattan bar as such concerns are usually conducted and might have lawfully procured and renewed the license and bond. But inasmuch as the company had

chosen to open and conduct one saloon and place it under the general control of Chan it is clear that his general powers did not extend beyond the conduct of that saloon in the usual and customary way.

In Texas Oil Co. v. National Oil Co., 40 S. W. Rep., 159, the declaration of the general manager held binding on the company was made regarding a transaction coming confessedly within his powers. We do not deem it necessary to discuss the other authorities cited. None is more nearly in point than those discussed above.

The fact that the president and one of the directors resided out of the State and Chan was the sole official representative of the company in the State does not alter the result. His powers were still confined to the conduct of the company's established business unless otherwise extended, and the undisputed proof is that he had no express authority to purchase the Stag or any other saloon.

Counsel on each side have devoted much space to the discussion of the power of Chan to bind the company by an accommodation endorsement, or to issue commercial paper in the company's name. Also to the question of notice on the part of Ochs that Chan was purchasing for himself and not for his principal. In our opinion neither of these inquiries is material to the disposition of this appeal. We have found that the evidence is insufficient to support the conclusion that the purchase was made for the Manhattan Company. It was clearly not made for use in the Manhattan bar, but to be conducted as a separate concern, and was in fact so conducted whether for Chan individually or otherwise. The company can not be held by estoppel because there was no holding out that Chan had such authority.

The fact that Chan took a case and barrel of liquor to the Manhattan bar and there used it in connection with the business can not justify the judgment if in fact Chan made the purchase for himself. Nor in such event would plaintiffs be entitled to a judgment for the value of the goods so taken from the Stag for they had no lien upon the Stag stock.

For the reasons given the judgment is reversed and the cause remanded. *Reversed and remanded.*

ON MOTION FOR REHEARING.

The motion for rehearing has been overruled.

In view of another trial we are requested to rule on the question whether if it should be found that Chan purchased the Stag Saloon and stock for the Manhattan Company with authority he could bind it by the execution of the promissory notes in question in the corporate name.

In our opinion if Chan bought the stock for the company upon due authority, the company would be liable upon the notes just as it would have been upon the original obligation had the notes not been given as evidence of the debt. There is no question of innocent holder in the companion case to this in which the German National Bank is plaintiff, and no equities which the liquor company could interpose in either instance.

This renders it unnecessary for us to write anything further in the German National Bank case. *Overruled.*

H. L. TRAMMELL v. ULLMAN, LEWIS AND COMPANY.

Decided June 14, 1906.

Garnishment—New Trial After Term—Judgment—Diligence.

In an equitable proceeding to set aside, after the adjournment of the term, a judgment obtained against plaintiff as garnishee, which recited that it was had upon "the evidence and from the answer," though such answer did not justify the judgment and plaintiff shows that he had a good defense to the proceeding, he must show also that he was prevented from making it without fault or negligence on his part; where he shows no attention given to the matter after filing answer, nor excuse therefor except that his attorney was sick, nor reason for not resorting to motion for new trial or appeal except his inexcusable ignorance that judgment had been rendered against him, his petition is subject to demurrer.

Appeal from the County Court of Galveston County. Tried below before Hon. Lewis Fisher.

Geo. W. Graves, for appellant.—On plaintiff's right to maintain this action, we cite the following authorities: Freeman v. Miller, 53 Texas, 372; Ragsdale v. Green, 36 Texas, 193; 1 Sayles' Texas Civil Practice, secs. 686-689.

On the insufficiency of the answer in garnishment to support the judgment, we cite the following authorities: Waples-Platter Groc. Co. v. Texas & P. Ry. Co., 68 S. W. Rep., 265; Darlington-Miller L. Co. v. National Surety Co., 80 S. W. Rep., 238; Medley v. American Radiator Co., 66 S. W. Rep., 86; Winslett v. Rundle, 1 White & W. C. C., 681; Shepflin v. Small, 23 S. W. Rep., 432; Rood on Garnishment, secs. 63, 118, 123.

A new trial may be granted after the expiration of the term of court at which the judgment was rendered upon the applicant showing sufficient matter to have entitled him to a new trial, if applied for during the term, and a sufficient legal excuse for not then having made his application. Freeman v. Miller, 53 Texas, 377; Nevins v. McKee, 61 Texas, 413; Gross v. McClaran, 8 Texas, 341; Spencer v. Kinnard, 12 Texas, 180; Fisk v. Miller, 20 Texas, 573; Davis v. Terry, 33 Texas, 426; Alexander v. San Antonio Lumber Co., 13 S. W. Rep., 1025; 1 Sayles' Texas Civil Practice, secs. 686-689, and authorities there cited.

Hunt & Myer, for appellees.—That the answer did not authorize the judgment rendered against the garnishee, is an error apparent on the face of the record, and equity will not disturb the judgment where it appears that the garnishee had an opportunity to sue out a writ of error. Texas-Mexican Ry. Co. v. Wright, 88 Texas, 346; San Antonio & A. P. Ry. Co. v. Glass, 40 S. W. Rep., 339.

It must appear that the defendant was not guilty of any negligence, and that the rendering of the judgment was obtained through fraud or mistake. Ovocato v. Del'Ara, 14 Texas Ct. Rep., 794; Adams v. First National Bank, 52 S. W. Rep., 642; Bailey et al. v. Boydstun, 33 S. W. Rep., 281; Anderson v. Oldham, 82 Texas, 233.

REESE, ASSOCIATE JUSTICE.—Ullman, Lewis & Company being judgment creditors of T. L. Larkin, who owed them $513.76 for which

they had obtained judgment in the County Court of Galveston County, sued out a writ of garnishment in statutory form against H. L. Trammell. The writ of garnishment having been duly served upon Trammell he made answer thereto as follows:

"I am unable to say at the present time in what amount I am indebted to T. L. Larkin, nor what I was indebted to the said Larkin when the writ of garnishment in this suit was served upon me, for the reason hereinafter set out. I have no effects of the said T. L. Larkin in my possession, nor had I any effects of the said T. L. Larkin in my possession when the said writ was served. I know of no other persons who are indebted to the said T. L. Larkin or who have effects belonging to the said Larkin in their possession, except Citizens National Bank of Beaumont, Texas, which has in its possession about eight hundred ($800) dollars deposited in said bank by me on the 22d day of July, 1903, with the intention of turning said amount over to Larkin when we should have a settlement, but before we, the said Larkin and myself, had a settlement the said bank suspended payment and is now in the hands of a receiver, and what percent said bank will pay to creditors on their deposits I am unable to say, but Larkin will lose whatever part of said amount that said bank fails to repay to me."

From certain allegations in the petition in this case it is to be inferred that Trammell was at the time a nonresident of Galveston County and made answer under the provisions of the statute with regard to garnishment proceedings against nonresidents, but it is not affirmatively so stated nor does it appear by positive averment or proof that such was the case. The answer of the garnishee appears to have been made September 28, 1903.

On October 27, 1903, judgment was rendered by the said County Court which, after reciting the existence of judgment against Larkin and the issuance and service of the writ of garnishment proceeds:

"And it further appearing to the court from the evidence and from the answer of said H. L. Trammell, garnishee, that the said H. L. Trammell is indebted to the said T. L. Larkin, and was when said writ was served upon him, in the sum of $800:

"It is therefore considered, ordered, adjudged and decreed by the court that plaintiff M. Ullman, who trades and does business under the firm name and style of "Ullman, Lewis & Co.," do have and recover of and from the defendant H. L. Trammell the sum of five hundred and thirteen and seventy-six one hundredths ($513.76) dollars, together with interest thereon from this day until paid at the rate of 10 percent per annum, and all costs herein incurred, for which said plaintiff may have his execution or executions, as many and as often as may be necessary, against the said H. L. Trammell; and further that the amount or amounts paid by or received from said H. L. Trammell upon this judgment shall be a credit upon his indebtedness, as aforesaid, to the said T. L. Larkin, and shall operate as payment and satisfaction of said indebtedness pro tanto."

On December 11, 1903, Trammell instituted this suit against Ullman, Lewis & Co., in the said court to set aside and vacate the aforesaid judgment against him and for a new trial. Plaintiff also at the time of filing the petition applied for and obtained a writ of injunction from

the county judge restraining the said Ullman, Lewis & Co., from further proceedings to enforce said judgment until the final determination of this case.

Defendant demurred generally to the petition and also by special exceptions objected that it appeared from the allegations of the petition that the judgment sought to be vacated was not rendered through any fraud on the part of defendant, nor by accident, mistake or error due to the acts of defendant, but was due to the negligence of plaintiff, and that plaintiff was not prevented from making his defenses, if any he had, by fraud, accident or acts of defendant. It is further objected, by special exception, that by the petition plaintiff seeks to set aside the judgment upon the ground that it was rendered upon evidence which it was alleged would not legally authorize the judgment, though the answer of the garnishee disclosed an indebtedness to Larkin in excess of defendant's debt against Larkin, and because it appears that plaintiff has failed to make an answer which would have protected him from said judgment, and it is not alleged that his failure to make such answer was caused by the fraud of defendant; and further that the petition shows that plaintiff has not availed himself of his remedy at law of appeal or writ of error to set aside said judgment.

Upon the hearing, the general demurrer and several special exceptions were sustained and the cause dismissed, from which judgment Trammell prosecutes this appeal.

The case as presented is a motion or petition for new trial made after the term at which the judgment was rendered, and is a purely equitable proceeding. The principles which govern such proceedings are well settled in this State, and are thus stated in the opinion of the Supreme Court in Nevins v. McKee (61 Texas, 413), from which we quote at length:

"The object of the present suit was to set aside a judgment duly rendered in a garnishment proceeding against Nevins, to retry the issue between parties determined in that cause, and have a decision made as to whether the plaintiff in that judgment, or another party who claimed to own the note, was entitled to recover against the garnishee. In fact it was an attempt by petition, filed after the adjournment of the term of the court at which the judgment was rendered, to obtain a new trial of the cause which had resulted in such judgment.

A court of chancery has power to grant such relief, but it will not do so except upon facts which show the clearest and strongest reasons for its interposition. It was held by this court in Johnson v. Templeton, 60 Texas, 238, that it is not sufficient to show that injustice has been done, or that the plaintiff had a good defense which he was prevented from making upon the trial. But he must further show that he has not resorted to chancery because of any inattention or negligence on his part. He must show a clear case of diligence as well as of merit; that he has a good defense which he was prevented from making by fraud, accident, or the acts of the opposite party, wholly unmixed with any fault or negligence on his part.

Here it is not pretended that the appellant was deprived of his defense by the fraud of anyone, or by any act chargeable to the plaintiff in garnishment. If his failure to appear and defend the action can

be said to have been due to accident, McKee had nothing to do with bringing it about, but it was owing solely to the negligence of Nevins or of the attorney to whom he intrusted the defense of the cause." (Taylor, Knapp & Co. v. Fore, 42 Texas, 253; Overton v. Blum, 48 Texas, 370; Johnson v. Templeton, 60 Texas, 239; Harn v. Phelps, 65 Texas, 597.)

Appellant states in his petition, very fully, that he is not indebted to Larkin and was not at the time of the service of the writ of garnishment, and thus shows what would have been a sufficient defense to the proceeding against him as garnishee, but it appears that after filing the answer herein set out he paid no further attention to the proceeding, but contented himself with merely filing the answer. It does not appear to us that the answer alone authorized the judgment against appellant, but upon the face of the judgment it appears to have been rendered upon "the evidence and from the answer" of the garnishee. The petition does not enlighten us further as to the pleadings or evidence in the case in which the judgment was rendered. The only excuse attempted to be given for the failure of appellant to give further attention to the case in which it was sought to charge him with so large a sum, if indeed it be appellant's intention to urge this as an excuse, is "that at the date of the said answer in garnishment and said judgment and until after the adjournment of the term of said court at which said judgment was rendered, plaintiff's attorney, who had charge of all of his legal business and particularly his business with said Larkin, was sick in bed and unable to represent plaintiff."

It may be freely conceded that it was error in the court to render judgment upon the uncontroverted answer of appellant to the garnishment alone, but it is not alleged that this was done, and if it had been, practically no excuse is shown for appellant's failure to pursue the plain legal remedy to have such error corrected by motion for new trial during the term, or by appeal or writ of error. It is true that it is alleged that appellant was ignorant that the judgment had been rendered until after the adjournment of the term, but this very ignorance was the result of his inexcusable neglect to give that attention to the suit, in the protection of his interest, which the law required of him. It is not pretended that appellees by any act of theirs induced the belief from which appellant seems to have acted that his answer would effectually prevent any judgment against him. The court had jurisdiction of the subject matter and of the parties. The most that can be claimed from the allegations of the petition is that the judgment was probably erroneous and that he has now a good defense to the demand against him. This is not sufficient to entitle him to set aside the judgment by this proceeding and have new trial of the cause.

The trial court did not err in sustaining the general demurrer and special exceptions.

The judgment of the court below is affirmed.

Affirmed.

Application for writ of error dismissed for want of jurisdiction.

WILLIAM OLSCHEWSKE v. JESSE KING.

Decided June 14, 1906.

1.—Possession as Notice—False Representations—Rescission.

One who buys land in possession of another is charged, as to the rights of such possessor, with notice of his title, but is not precluded thereby, as against the vendor, from maintaining suit for rescission of the contract on the ground that he relied on false representations by the vendor as to his title and right of possession.

2.—Same—Pending Suit—Estoppel.

One contracting to buy land in reliance on false representations by the vendor as to his title and right of possession is not precluded from maintaining suit for the rescission of such contract, recovery of money paid, and cancellation of purchase-money notes, by the pendency of a suit against him and his vendor, by third parties, concerning the right to and possession of the land, nor by the fact that he did not set up in that suit his right to rescind.

Appeal from the District Court of Harris County. Tried below before Hon. Norman G. Kittrell.

Baldwin & Christian, for appellant.—The court erred in holding that the plaintiff, Jesse King, could recover any sum whatever against this defendant prior to the final determination of the case of Summerville v. King. Pride v. Whitfield, 51 S. W. Rep., 1100; Mullins v. Wimberly, 50 Texas, 464; Barnet v. Vincent, 69 Texas, 688; Cameron v. Romele, 53 Texas, 242; Glendenning v. Bell, 70 Texas, 634; Smith v. James, 22 Texas Civ. App., 156; Houston & T. C. Ry. Co. v. Graves, 50 Texas, 202; San Antonio & A. P. Ry. Co. v. Griffin, 20 Texas Civ. App., 95; St. Louis, etc., Ry. Co. v. Moss, 9 Texas Civ. App., 7; Wolcott v. Hendrick, 6 Texas, 416; Henderson v. Morrill, 12 Texas, 3; Pitts v. Ennis & Reynolds, Admrs., 1 Texas, 605; Clegg v. Varnell, 18 Texas, 304; Galveston, H. & S. A. Ry. Co. v. Dowe, 70 Texas, 11.

Plaintiff King being charged with notice of the interest of the Summerville minors, he can not recover in this cause. Same authorities.

Plaintiff in this case was estopped to set up this action by reason of his connection with a former suit of Summerville v. King. Houston & T. C. Ry. Co. v. Graves, 50 Texas, 202; San Antonio & A. P. Ry. Co. v. Griffin, 20 Texas Civ. App., 95; Pitts v. Ennis & Reynolds, Admrs., 1 Texas, 605; Wolcott v. Hendrick, 6 Texas, 416; St. Louis, etc., Ry. Co. v. Moss, 9 Texas Civ. App., 7; Henderson v. Morrill, 12 Texas, 3; Galveston, H. & S. A. Ry. Co. v. Dowe, 70 Texas, 11; Clegg v. Varnell, 18 Texas, 304; Smith v. Power, 2 Texas, 68, 69.

James R. Masterson, for appellee.—Where the contract is executory, a vendor's lien being retained by the deed for the greater part of the consideration, the vendee who purchased relying on false representations as to title is not bound to pay in full the price and look to vendor's warranty, nor is he bound to await the result of litigation over the title to enable the vendee to acquire the title and put him in actual possession as promised. Moreland v. Atchison, 19 Texas, 308; Green v. Chandler, 25 Texas, 149.

PLEASANTS, ASSOCIATE JUSTICE.—Appellee brought this suit against appellant to rescind a contract of sale of land and to recover the money and cancel the notes given by him as consideration for the conveyance to him by appellant of said land.

The facts disclosed by the record are these: On March 10, 1903, appellant sold and conveyed to appellee lots 4 and 5 in block 21 in Castanie's Addition to the city of Houston, for a consideration of $1,250, of which $250 was paid in cash by appellee, and for the balance he executed his 67 promissory notes, 66 for $15 each and 1 for $10, payable respectively in from 1 to 67 months after date. The deed reserved a vendor's lien to secure the payment of the notes. Appellee purchased the property with the intention of making it his home. As an inducement to appellee to make the purchase appellant represented to him that he had a perfect title to the property and could and would place him in immediate possession, and but for such representation and promise appellee would not have agreed to buy the property.

At the time the contract of sale was made appellee knew that the property was in the possession of Mrs. Somerville and her minor children, but she was holding as a tenant of appellant and appellee had no actual knowledge of any title or claim on the part of said minors. Appellant failed to put appellee in possession of the premises as he agreed and promised to do and did not, in fact, own the property as he represented, but only had title to an undivided one-half interest therein.

Shortly after the execution of the deed the Somerville minors brought suit against appellant and appellee, claiming a one-half interest in the property in fee and the right to occupy the entire premises as a homestead so long as their guardian, with the permission of the County Court of Harris County, should so elect. The suit was tried in the District Court of Harris County on July 6, 1903, and judgment was therein rendered in favor of plaintiffs decreeing them title to one-half the property and the homestead rights claimed in their petition.

This judgment was appealed from and was affirmed by the Supreme Court insofar as it adjudged title in the Somerville minors to one-half of the property, but was remanded to the District Court for the adjustment of certain equities growing out of improvements. The suit of the Somerville minors had not been finally disposed of in the District Court at the time this cause was tried. Shortly after the judgment in favor of the Somerville heirs was rendered in the District Court the appellee herein tendered appellant a deed reconveying the property to him and demanded the return of the money and notes before mentioned. This demand was refused and thereupon this suit was instituted.

The petition in this cause alleged the facts above stated, in substance, and prayed for judgment for the $250, with interest from the date of its payment, and for the cancellation of the notes above described.

The defendant answered by general exception and general denial, and by special plea in which he set up the pendency of the suit by the Somerville minors and the knowledge of the plaintiff that said heirs were in possession of the premises at the time he purchased from appellant, and avers, "that by reason of the facts above set forth, the plaintiff is estopped from suing upon a warranty of title, and estopped from claiming that said title has failed, and by reason of the fact that plain-

tiff, when he bought said property, knew of the claim of the Somervilles thereto, and of the pendency of the suit hereinbefore mentioned, the plaintiff can not now maintain this suit, and is estopped from so doing." He also filed a cross-bill by which he sought recovery against plaintiff of the amount due upon the notes with interest and attorney's fee. The cause was tried without a jury and judgment rendered in favor of plaintiff for $296, and for rescission of the sale and cancellation of the notes.

The first and second assignments of error complain of the judgment on the ground that it is not supported by either the pleading or the evidence, in that the petition alleges and the findings of fact by the trial judge establishes that appellee knew at the time he purchased the property that the Somerville minors were in possession, and he was thereby charged with notice of any title or claim which they had to said property and will not be heard to say that he bought the property relying on the representation of the defendant and without knowledge of any adverse claim. There is no merit in these assignments.

The authorities cited by appellant and the doctrine of notice invoked by him in support of the assignments have no application in this case. It is well settled that one who buys land in possession of another will not, as to such possessor, be heard to say that he purchased without notice of the possessor's title, but is charged with constructive notice of whatever right or title the possessor has in the property, possession being as conclusive evidence of notice as is the registration of a deed under the statute. Under this rule appellee could not claim as against the Somerville heirs that he did not purchase with notice of their title, but it cannot be held as matter of law that because he was charged with notice of their title he could not have relied upon the representation of appellant that he owned the property and would put him in possession of it.

The trial court found that such representations were made by the appellant and were relied on by the appellee. There is no statement of facts in the record and the findings of fact by the trial court must be conclusively presumed to be supported by the evidence. We do not understand appellant to contend otherwise, but his contention is that because it appears from the petition and the findings of fact that appellee knew that the Somerville heirs were in possession of the property he can not, as a matter of law, be heard to say that he relied upon appellant's representation as to the title of the property. As we have before said, this contention can not be sustained.

The appellee was not required to set up his right to rescind the sale in the suit brought against him and appellant by the Somerville heirs and his failure to do so does not now estop him from asserting that right, nor is his right to maintain this suit affected by the fact that the former suit is still pending.

There is no finding by the trial court that appellee prosecuted an appeal from the judgment in favor of the Somerville heirs, and from the fact that shortly after the judgment in that suit was rendered in the District Court appellee tendered appellant a deed reconveying the property and demanded a rescission of the contract, the presumption is that he did not appeal from that judgment.

These conclusions dispose of all of the questions raised by the re-

maining assignments presented in appellant's brief and it is unnecessary to discuss them in detail.

We think the trial court's judgment should be affirmed and it has been so ordered.

Affirmed.

Writ of error refused.

R. A. LOGAN V. G. P. MEADS ET AL.

Decided June 16, 1906.

1.—Boundary—Conflicting Testimony—Peremptory Charge.

Where witnesses differed in their testimony as to the location of a boundary line it was error for the court to instruct a verdict for the plaintiff for the land described in his petition.

2.—Trespass to Try Title—Joint Owners.

In trespass to try title, one or more of several joint owners may recover the entire tract against a stranger to the title.

ON REHEARING.

3.—Adverse Possession—Definition—Charge.

Our statute sufficiently defines the character of the adverse possession necessary to support the ten years statute of limitation, and it was error, under the facts of this case, for the court in its charge to undertake to amplify the terms which the Legislature has carefully defined.

4.—Adverse Possession—Claim of Right—Charge.

It was error for the court, under the testimony in this case, to charge the jury in effect that if the defendant, at the time he went into possession of the land in controversy, had no intention of claiming the same by limitation, and that he had no such intention until a later date—less than ten years before suit filed—and that prior to said date, although holding the land, he was not doing so in repudiation of the right of the owner, then there would be no adverse possession within the meaning of the law; because, if the defendant claimed the land in controversy for the statutory period adversely, within the meaning of the statute, it was entirely immaterial that he made no claim thereto by "limitation," "at the time he went into possession," or at any other time.

Appeal from the District Court of Archer County. Tried below before Hon. A. H. Carrigan.

Matlock, Miller & Dycus and *Jno. Purcell,* for appellant.

Spoonts, Thompson & Barwise, for appellees.

CONNER, CHIEF JUSTICE.—Our conclusions under the first assignment are that the court did not commit reversible error in peremptorily instructing the jury to find for the plaintiff unless they found for the defendant under his plea of limitation, on the first proposition. For at the time of the trial it seemed undisputed, and appellant himself acceded to the contention for several years prior to the trial, that the land described in appellees' petition was in fact a part of survey No. 1. He rendered and paid taxes upon it as such, and it was in effect so assumed in appellant's requested special charge No. 5. So that to this extent

no error was committed in relieving appellees of the burden of proof by the peremptory instruction.

We think, however, that the peremptory instruction was erroneous, as asserted in the third and fourth propositions under the first assignment of error, insofar as it assumed that all of the land described in appellees' petition was a part of survey No. 1. There was a conflict in the testimony of the surveyors in fixing the east line of survey No. 2. According to the testimony of surveyor Hart, the east line of survey No. 2 was but 642 varas west of the fence described in the testimony. Surveyor Henderson makes this distance 675 to 730 varas, while by the instruction the jury were in effect arbitrarily directed to return a verdict for the appellees for the entire 678 varas described in the petition, unless they found for appellant by limitation. We think it should have been left to the jury under appropriate instruction to determine from the evidence and fix the dividing line between the surveys. The court could have thus determined the precise amount of the land owned by appellees that was within appellant's enclosure. The jury might have adopted Hart's testimony; and we hence conclude that the judgment must be reversed because of the error noted, unless appellees, as we think they may do, within ten days remit in this court recovery of all land described in their petition lying west of a dividing line between the two surveys drawn from a point 642 varas west of the north end of said fence.

In the third and fifth assignments the fifth clause of the court's charge is attacked, but in view of the decisions cited in appellee's brief, we feel unable to say that it is affirmatively erroneous, though it may be doubted whether the statute on the subject of adverse possession should be thus enlarged. Nor do we feel satisfied to say that the emphasis given to the phase of the case therein presented authorizes a reversal. That appellant had within his actual enclosure and possession the land or a part of the land in controversy is undisputed. The crucial question seems to have been whether such possession was adverse—hostile to the true owner—and the court was evidently but endeavoring to point out and make clear to the jury this issue. That in doing so he may have been somewhat more prolix than was necessary should not be ground for reversal, in the absence of a showing that the jury were misled to appellant's prejudice, and this we feel unable to affirm. The assignments mentioned are accordingly overruled.

While we would perhaps have felt better satisfied had appellant's special charge No. 5 been given, we have finally concluded that its rejection hardly justifies a reversal, inasmuch as the court's charge was sufficiently comprehensive on the same subject. For instance, in the second paragraph the jury are plainly instructed to find for appellant if they believe his possession was adverse. By this charge the jury must have understood that it was utterly immaterial whether appellant claimed the land as a part of survey No. 1 or under the mistaken belief that it was a part of survey No. 2 purchased by him of George Cranmer. Such, also, is the plain import of other paragraphs of the court's charge, so that we think the fourth assignment must be overruled.

The second, seventh, eighth and ninth assignments are all overruled

as immaterial. It is undisputed that appellees were at least joint owners of the greater part of the J. Poitevent survey No. 1. They hence were undoubtedly entitled to recover against all persons not showing an affirmative right or interest in said survey. The fact, therefore, that appellees failed to show a complete chain of title to all interests embraced in survey No. 1, and that the court may have erred in permitting appellees to use in evidence the records specified in the seventh, eighth and ninth assignments, is of no consequence.

Save as modified by what we have said in disposing of the first assignment of error, we think the burden of proof was upon appellant to establish his plea of limitation, and by reference to page 54 of the transcript it will be seen that the court expressly instructed the jury to disregard contents of letters read in the presence of the jury. The sixth and tenth assignments are hence likewise overruled.

The foregoing conclusions briefly dispose of all assignments, and in accordance therewith it is ordered that the judgment be reversed and the cause remanded for the error pointed out in disposing of the first assignment, unless appellees file remittitur as stated in that connection, in which event the judgment will be affirmed.

Reversed and remanded, unless remittitur is filed.

ON MOTION FOR REHEARING.

Upon reconsideration of this case we have become convinced that the motion for rehearing should be granted and the judgment reversed for the errors pointed out in the third and fourth assignments in appellant's original brief.

In the third assignment objection is made to the fifth clause of the court's charge on the ground that it "gave undue prominence to the character of the possession and appropriation required by piling, one upon another, a number of adjectives which were misleading and erroneous, and by further instructing the jury that they must constitute a disseizing of the owner." The charge objected to is as follows: "In order for the defendant Logan to be entitled to claim the land in controversy under his plea of ten years limitation his possession must have been visible, distinct, notorious, continued and hostile for the full period of ten consecutive years prior to the filing of this suit. It must have been an actual, open and peaceable appropriation of the land under a claim of right inconsistent with the rights of the true owner, and must disseize the owner, and the claim must be for the land described in plaintiffs' petition."

Our statutes carefully define the essential elements constituting title by limitation. Article 3343 declares that: "Any person who has the right of action for the recovery of any lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward." Article 3347: "Whenever in any case the action of a person for the recovery of real estate is barred by any of the provisions of this chapter the person having such peaceable and adverse possession shall be held to have full title, precluding all claims." The

peaceable and adverse possession mentioned in the articles quoted are then defined as follows: "'Peaceable possession,' within the meaning of this chapter, is such as is continuous and not interrupted by adverse suit to recover the estate." Article 3348: "'Adverse possession' is an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another." Article 3349.

Why, then, should it be necessary for the court in his charge to amplify terms which the Legislature has been so careful to define? That the court has done so in the case before us is perfectly apparent, and we can but think it was harmful when the quoted charge is read in the light of the evidence. We will not undertake to set it out, for it is voluminous. But it brings the conviction that for many years appellant, and others, supposed that the land in controversy was a part of the survey owned by him. It was so enclosed, and so purchased, occupied and claimed by appellant, according to his testimony, from March, 1889, to January, 1900 or 1901,—more than ten years prior to the institution of this suit. It seems undisputed that his possession was "continuous and not interrupted by adverse suit," and therefore "peaceable" within the meaning of the statute. There is some testimony tending perhaps to show that some five or six years after appellant's purchase and entry, the owners of survey No. 1, adjoining appellant's survey No. 2 on the east, claimed that a part of said survey No. 1 was within appellant's enclosure and that appellant acquiesced in the claim by paying lease money therefor. But this testimony is by no means conclusive and is positively denied by appellant. The least that can be said of it is that there is nothing therein requiring an instruction to the jury that appellant's claim must have been "notorious" and his possession such as to "disseize" the owner. The terms of the statute, in our judgment, would have sufficiently and more appropriately applied to the facts, and the enlargement thereof by the court was very probably prejudicial.

The case of Beall v. Evans, 1 Texas Civ. App., 446, so much relied upon by appellees, we think distinguishable from the one before us. That was a case of a contest between tenants in common. In such cases the relation between such joint owners is in the nature of a trust relation. The possession of one is the possession of all. The owner of a part may recover the whole as against all the world, save a cotenant or coowner, upon proof of ownership of such part alone. The fact of his possession with claim of right is not deemed inconsistent with the right of his cotenant unless he holds and claims to the exclusion of such cotenant. And therefore, as stated in the decision referred to and in cases cited in support thereof, before one tenant in common of land will be awarded the interest therein of a cotenant, on the ground of limitation, his claim and possession for the statutory period must amount to a repudiation of the trust relation, and such as is sufficient to give his cotenant notice that he claims and is possessed of the whole to the exclusion of such cotenant. But, as before stated in effect, we see nothing in this case requiring emphasis to be given to the terms of the statute defining adverse possession, and we think the court erred in doing so.

In the fourth assignment complaint is made of the court's refusal to

give the following special charge, viz.: "Gentlemen of the jury: If you find that the defendant took possession of the land in controversy, under the mistaken belief that the east boundary line of the land he had purchased, was as the east fence built by George Cranmer, and that he kept and maintained peaceable, adverse and exclusive possession of the land up to said fence under such mistaken belief for 10 years prior to the institution of this suit, intending all the while to claim all of the land in controversy as a part of his said section, and that when he found out that there was doubt as to where the line was, intended to and did claim said land by limitation from that time, and that he has all the time claimed all of the land up to the east fence against the owner, then you will find for the defendant, although you may believe that defendant did not know that he had any part of the Poitevent survey No. 1, inside of his enclosure at the time he took possession."

In order to show the importance of this charge to appellant's rights, we will set forth a part of his cross examination and a special charge, given at appellees' request, viz.: " . . . Q. Was it your intention at the time you bought this land and went into possession of it, to claim any land in that enclosure by limitation? A. I did not know anything about limitation at the time I bought it. Q. Please answer the question Yes or No—I will ask you again—Did you at the time you bought the 640 acres of land from Cranmer and went into possession of the land, did you or not intend to claim any land in that pasture by limitation—That is a plain question, and I would like to have you answer Yes or No, or say you don't know? A. I intended to claim the land I had bought. Court: Just answer the question. Q. Did you or not intend to assert any claim for any land in that enclosure by limitation? A. Not at the time, I did not. Q. Not at that time? A. No, sir. Q. When was it that you first made up your mind that you were going to claim by limitation any land in that pasture? A. When Webb came to me to pay lease on it. Q. What year? A. 1901 I think—maybe 1902. . . ." (Tr. pp. 11, 12.) "—— Q. Now then I want you to tell the jury what was the first year and when was the first year that you ever rendered any part of the Poitevent survey No. 1 in controversy, to the tax collector of this county for taxes? A. I could not remember—the tax rolls would have to show that. Q. Is not it a fact, that it was in the year 1900? A. I am not positive about that—somewhere about that. Q. It was less than four years at any rate." A. That is about the time that I think that I ascertained that there was some land there. Q. That was not what I was asking you—it is true, the first time you ever rendered for taxes any land out of the Cranmer land, was some four years ago? A. About that . Q. In other words, when you made up your mind to claim this land by limitation—then it was you began to render it for taxes and pay taxes—Is it not true? A. Yes, sir, about then. . . ." (Tr. pp. 14, 15.)

The charge given at appellees' instance is as follows: "Gentleman of the jury: If you find and believe from the testimony that the defendant, R. A. Logan, at the time he went into possession, had no intention of claiming by limitation that portion of J. Poitevent survey No. 1, which was enclosed with the Cranmer section, and that he had no such

intention to so claim the land by limitation until during the time of the Webb lease, or about the year 1901; and that prior to this date, although holding the land, was not doing so in repudiation of the right and ownership of the owners of said land—then, there would not be adverse possession within the meaning of the law, and your verdict should be for the plaintiffs." (Tr. p. 7.)

In view of this cross examination and of the instruction given, it seems to us that appellant was at least entitled to have the jury instructed as sought in the refused charge. It embodied the substance of appellant's testimony in chief, and was nowhere else so clearly presented. If appellant claimed the land in controversy for the statutory period "adversely," within the meaning of the statute, it is entirely immaterial that he made no claim thereto "by limitation," "at the time he went into possession"; or at any other time. (Daugherty v. New York & T. Land Co., 61 S. W. Rep., 947; Hand v. Swann, 1 Texas Civ. App., 244; Cartwright v. Pipes, 9 Texas Civ. App., 311; Jayne v. Hanna, 51 S. W. Rep., 296; Bisso v. Casper, 14 Texas Civ. App., 19.)

Judgment is reversed and cause remanded.

Reversed and remanded.

J. A. ELLIOTT v. I. C. MORRIS.

Decided June 16, 1906.

1.—Deed—Delivery—Evidence.

A creditor of the owner of a tract of land wrote to him offering a certain price for the land, and saying that if he did not wish to take the price offered, then to give him some showing for what he owed, and referred him to the creditor's attorney to "fix it up some way." The debtor went to the attorney named, presented the letter, and stated that he desired to convey the land to the creditor. A deed was prepared, signed and acknowledged by the debtor, and delivered by him to the attorney for the creditor. Held, a complete delivery, though the creditor was not notified of the matter until long after.

ON REHEARING.

2.—Practice on Appeal—Undisposed of Issue.

Where an issue is raised by the pleadings and evidence in the trial court, but not disposed of by the judge, the Appellate Court, upon reversing the judgment of said court, should remand the cause in order that said issue might be disposed of.

Appeal from the District Court of Nolan County. Tried below before Hon. James L. Shepherd.

Orrick & Terrell, for appellant.

Wagstaff & Davidson, for appellee.

SPEER, ASSOCIATE JUSTICE.—This was a suit in trespass to try title instituted by appellant against appellee to recover section No. 34,

block No. 20, Texas and Pacific Railway Company survey in Nolan County, and resulted in a finding by the court in favor of appellee.

The pivotal question in the case is whether or not there had been a delivery of a certain deed executed by one W. C. Logan, conveying the land to appellant and another. Upon this issue the trial court found that there had been none, while we are constrained to hold otherwise.

We find that on November 14, 1900, the State issued a patent to W. C. Logan for the land in controversy, and that thereafter, on February 7, 1901, I. C. Morris, the appellee, instituted suit against him wherein he recovered judgment for the title and possession of the same, and that such judgment was subsequently affirmed by this court. Appellant was not a party to that suit. On January 4, 1901, appellant, then a creditor of Logan for a sum in excess of the value of the land, wrote Logan as follows: "Now, W. C., you have a patent to 34. Will give you $2.25 per acre. If you don't want to take the price, I would like to have some showing for what you owe me. If you will, I wish you would go to Beall and Beall and fix this up some way. I would like to hear how everything is out there." In pursuance of this, Logan went to the office of Beall & Beall, attorneys at law, and presented the letter to W. W. Beall, a member of that firm, stating that he owed appellant and desired to sell him the land. Mr. Beall prepared a general warranty deed conveying the land to appellant and W. F. Elliott, which deed was duly acknowledged by Logan and by him delivered to Mr. Beall for appellant. The deed was placed among the papers of appellant in the office of Beall & Beall, though he was never informed by anyone of the execution of the deed until about November, 1903, when Logan made a substitute deed for the one of January 21, 1901, which had been burned in a fire which consumed the office of Beall & Beall. The insertion of the name of W. F. Elliott as a grantee in the conveyance was a mistake of the attorney preparing the deed, W. F. Elliott in fact having no interest in the land. Beall & Beall were attorneys for appellant generally in his business matters. These facts we think show a complete delivery of the deed of conveyance by Logan to appellant. It is a case of delivery to a designated agent with authority to accept.

It was wholly unnecessary to complete the delivery that Beall & Beall should have notified appellant of the execution of the deed. The delivery was complete when in pursuance of the previous offer of appellant, Logan accepted the $2.25 per acre and went to the designated attorneys and made his deed. He accepted the offer in its exact terms and manner proposed. Nothing more remained for him to do, and he could undo nothing he had done. Appellant's letter of proposal referring Logan to Beall & Beall conferred upon them at least the implied authority to represent him in the matter of closing up the purchase of the land if Logan accepted the offer.

Appellee is in no sense an innocent purchaser of the land, nor does he claim to be. His judgment against Logan was recovered at a time when Logan had no title to the land and the same is in no manner binding on appellant.

The judgment is therefore reversed and rendered for the appellant.

ON REHEARING.

We deem it to be our duty to remand this cause for another trial, rather than to render judgment for the appellant, as we did upon the original hearing. We do this upon the issue of *res adjudicata* raised by appellee in his first amended original answer upon which the case was tried, wherein it was asserted that appellant was in effect a party to the suit instituted by appellees against W. C. Logan on February 7, 1901, in that the title to the land in question was in the name of said Logan, who was then representing appellant and had charge, management and control of the lands in controversy, and that appellant defended said cause of action employing attorneys to represent the said Logan, who was only a nominal defendant. Upon the issue thus raised the trial court made no findings. We therefore remand the cause to the District Court of Nolan County for another trial. See Bomar v. Ft. Worth Building Association, 49 S. W. Rep., 914; McCreery v. Everding, 54 Cal., 168; McClelland v. Hurd, 21 Colo., 197; Thomsen v. McCormick, 136 Ill., 135; Montgomery v. Vickery, 110 Ind., 211; Worley v. Hineman, 33 N. E. Rep., 260; Stoddard v. Thompson, 31 Ia., 80.

In other respects we adhere to the conclusion announced in our original opinion.

Reversed and remanded.

W. M. MCDONALD ET AL. v. CECIL A. LYON.

Decided June 16, 1906.

1.—Political Party—Executive Committee—Powers—Injunction.

In a suit to enjoin the Chairman of the Executive Committee of the Republican party in Texas from calling a State convention of said party, on the ground that the action of said committee was illegal, and the individual members of said committee were disqualified from acting, and the place selected was practically inaccessible to a large majority of the members of said party, it appearing that no property rights were involved, a demurrer to the bill was properly sustained and the suit dismissed. A court of equity will not undertake to supervise the acts and management of a political party for the protection of a purely political right.

Appeal from the District Court of Grayson County. Tried below before Hon. B. L. Jones.

William H. Allen, for appellants.—The appellants, as members of the Republican party in Texas, have the right to maintain this suit, notwithstanding the fact that the illegal act complained of is a public injury; for the reason that they show that they are thereby threatened with an injury peculiar to themselves, in that they allege that if said illegal act be carried into effect they will each, in order to exercise their rights and privileges as the members of said party be forced to the necessary expense and time and trouble of going a greater distance from their homes to attend the State convention of their party than they would otherwise be required to do. Williams v. Davidson, 43 Texas, 1; Shephard v. Barnett, 52 Texas, 638; San Antonio v. Strumberg, 70

Texas, 366; Nalle v. City of Austin, 21 S. W. Rep., 374; Smith v. Swormstedt, 16 Howard, U. S., 302; Milhau v. Sharp, 27 N. Y., 611, 84 Am. Dec., 314.

It is well settled that where an act, although political in its nature is ministerial, requiring the exercise of no discretion to be performed, a court of equity has full jurisdiction to grant relief. Evans v. Santana Live Stock and Land Co., 81 Texas, 622; Bourgeois v. Mills, 60 Texas, 76; Simkins on Injunctions, 478; 5 Pom. Eq. Jur., 309, 328, 329; Board of Liquidation v. McComb, 92 U. S., 531, 541; State v. Cunningham, 81 Wis., 440.

Wolf, Hare & Maxey, J. W. Ownby and *William H. Atwell,* for appellee.—In all countries subject to common law, no action lies to restrain or interfere with mere public rights at the suit of an individual who has not suffered or is not threatened with some damage peculiar to himself. As applied to public measures, the doctrine is elementary. City of San Antonio v. Strumberg, 70 Texas, 366; Hulse v. Powell, 51 S. W. Rep., 862.

A court of equity on application for injunction will not try and determine cases involving the title to an office. Caruthers v. Harnett, 67 Texas, 131; 5 Pomeroy's Equity, sec. 333.

An injunction will not issue for the purpose of restraining the holding of an election, or of directing or controlling the mode in which, or of determining the rules of law in pursuance of which an election shall be held. An election is a political matter, with which the courts of equity have nothing to do. Winnett v. Adams, 99 N. W. Rep., 681; 5 Pomeroy's Equity, secs. 324, 329. 331, 332, 333, 335, 338; Alderson v. Commissioners of Kanawha Co. Ct., 5 Law Rep. Ann., 334; Simkins Equity, pp. 51, 447; McAllen v. Rhodes, 65 Texas, 348; Hardesty v. Taft, 87 Am. Dec., 584; Allen v. The State, 68 Am. Dec., 457; 2 Beach Equity Jurisprudence, sec. 670.

BOOKHOUT, ASSOCIATE JUSTICE.—This suit is for an injunction by the appellants to restrain the appellee, who is the chairman of the State Executive Committee of the Republican party in Texas, from issuing his call as such chairman for the next State Convention of said party to be held in the city of El Paso, Texas, which the bill alleged he was about to do in obedience to an order of the Executive Committee of said party. The allegations of the original and supplemental bill are in substance:

1st. That the plaintiffs are members of the Republican party in Texas and reside respectively in Kaufman, Hunt, Dallas and Victoria Counties, each living at a distance of more than six hundred miles from the city of El Paso.

2d. That on the 8th day of May, 1904, the Executive Committee of the Republican party of Texas purported to act in the selection of a place for the next State Convention and purported to select the city of El Paso as the place of such meeting; that said State Executive Committee is vested with authority to select such place of meeting, but the law provides that the meeting of the Executive Committee at which such selection is to be made shall be held on the second Monday in

June, and further provides that no one shall act as chairman of such Executive Committee or as a member of such committee who holds an office of profit or is a candidate for an office of profit under the United States; that the said action of said Executive Committee in considering and determining said place of meeting was illegal in that the meeting was held before the time authorized by law and that the members participating in said meeting were all officers or candidates for office of profit under the United States, naming the several members of the committee and the offices held by them or for which they were candidates and that the defendant himself was disqualified from acting as chairman of said committee at the meeting held, in that he was an officer of the United States holding an office of profit at the time of said meeting, it being alleged that he was at said time the duly appointed and acting receiver of a corporation under appointment of the United States Circuit Court.

3d. That it has been determined by the Republican party that it will hold no primary elections for State officers in this State this year and that its candidates for State offices shall be nominated by the said convention provided by the law to be held on the second Tuesday in August next.

4th. That a majority of the members of the said State Republican Executive Committee who are qualified by law to act would select a central place in the State for holding said State Convention, more convenient and accessible to ninety percent of the members of the Republican party and to the plaintiffs in particular, than the place purported to be selected by the said illegal meeting and illegal action of the said Executive Committee.

5th. That if said State convention be called by the defendant to meet at El Paso as directed by the said illegal determination and decision of the said Executive Committee, it will necessarily entail upon the plaintiffs great expense and loss of time and will operate as an irreparable injury to a great majority of the Republican party and to the plaintiffs in particular.

6th. Plaintiffs prayed for an injunction restraining defendant from issuing said call and from convening the Executive Committee prior to the second Monday in June for the purpose of selecting the place for holding said State Convention and from further acting as chairman of said Executive Committee so long as he holds the office of receiver, and that on final hearing they have a decree perpetuating such injunction and for general relief.

The defendant demurred to the bill on the grounds that the plaintiffs were not entitled to the relief sought and that the matters complained of were political and discretionary, and plaintiffs had no such interest in the matter in controversy as entitled them to the relief sought, and that the court was without jurisdiction to hear and determine said cause, which demurrers were sustained by the court, and plaintiffs declining to amend, judgment final was rendered against them dismissing said bill, and from said judgment they prosecute this appeal.

Did the court err in sustaining the exceptions to the petition and in entering judgment dismissing the case? The appellants contend that

as members of the Republican party in Texas they have the right to maintain this suit, notwithstanding the illegal act complained of is a public injury, for the reason that they show that they are thereby threatened with an injury peculiar to themselves in that they allege that if said illegal act is carried into effect they will each, in order to exercise their rights and privileges as members of said party, be forced to the necessary expense, time and trouble of going a greater distance from their homes to attend the State Convention of their party than otherwise they would be required to do. It is conceded that the Executive Committee of the Republican Party of Texas is vested by law with power to select the place for holding its State Convention, but it is contended that such committee having selected the city of El Paso, a place located over six hundred miles from the residences of petitioners, works a special injury to them. Is this contention sound? It is not shown that either of said petitioners is a member of the Republican State Executive Committee, or that either of them is a prospective candidate for office to be voted for in the Republican primaries. No property rights are involved. It is not alleged, except inferentially, that either of appellants excepts to or contemplates attending the Republican State Convention.

In the case of San Antonio v. Strumberg, 70 Texas, 368, the plaintiff sought to enjoin the construction of a city hall on an open space known as the "Military Plaza" in the city of San Antonio. The plaintiff was a property owner and taxpayer in the city, but his property did not abut on the plaza and it did not appear that he was specially injured by the obstructions that were about to be placed thereon. It was held that where the injury inflicted is of a character which affects the public generally, and inflicts no special wrong to the individual the suit must be brought by those who are entrusted with that duty by the Legislature. In that case the court say: "It is a principle established by the overwhelming weight of authority in the courts of all countries subject to the common law, that no action lies to restrain an interference with a mere public right at the suit of an individual who has not suffered, or is not threatened with some damage peculiar to himself." This holding is conclusive of appellants' contention. It appears that the injury of which appellants complain is one common to ninety percent of the members of the Republican party in Texas. The appellants fail to show that they have suffered or are threatened with such special damage peculiar to themselves as entitles them to equitable relief. (Hulse v. Powell, 51 S. W. Rep., 862.)

Again, there was no error in sustaining the demurrers to the petition and dismissing the cause, for the reason the petition seeks an injunction of rights which are merely political. A court of equity will not undertake to supervise the acts and management of a political party for the protection of a purely political right. As was stated in Fletcher v. Tuttle, 87 N. E. Rep., 686 (Ill.), quoting from Kerr on Injunctions: "It is elementary law that the subject of the jurisdiction of a court of chancery is civil property. The court is conversant only with the questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely

criminal or merely immoral, which do not affect any right of property. Nor do matters of political character come within the jurisdiction to interfere with the public duties of any department of government, except under special circumstances and where necessary for the protection of property rights."

A court of equity will not undertake to supervise the acts of the Executive Committee of the Republican party of Texas, for the protection of a purely political right, such as that alleged in plaintiffs' petition. (Winnett v. Adams, 99 N. W. Rep., 681; Fletcher v. Tuttle, 37 N. E. Rep., 683, 151 Ill., 41; State v. Aloe, 54 S. W. Rep., 494 (Mo.); Green v. Mills, 69 Fed. Rep., 859; 5 Pom. Eq., secs. 324, 331, 332.) If these rights are interfered with the injured party must look to some other source than a court of equity for redress.

We conclude the trial court did not err in sustaining the demurrers to the petition and dismissing the suit. The judgment is affirmed.

Affirmed.

ROBERT COLEY v. KANSAS CITY SOUTHERN RAILWAY COMPANY.

Decided June 20, 1906.

1.—Interstate Commerce—Termination of Transit.

If it be conceded that a railway, in transporting its own construction materials, is engaged in commerce, a shipment of steel rails, for defendant, to the point in Arkansas, on defendant's railway, to which it was consigned had completed its interstate transit when received there, and ceased to be an interstate shipment from that time. Gulf, C. & S. F. Ry. Co. v. State, 97 Texas, 274, followed.

2.—Same—Federal Statute—Automatic Coupler.

The United States statute requiring interstate carriers to equip their cars with automatic couplers has no application to the case of an employe injured while engaged in coupling, for further and intrastate transportation over his employer's road, and use thereon, a car of construction materials shipped to it from another State and which had been received at the point of destination of such interstate shipment.

Appeal from the District Court of Bowie County. Tried below before Hon. P. A. Turner.

Todd & Hurley and *F. M. Ball,* for appellant.—The court could not legally direct a verdict for defendant on account of the evidence showing that plaintiff assumed the risk of injury, because under the statute of the United States the defense of assumed risk was not available to defendant, it being an undisputed fact that the defendant did not have and provide an automatic coupler as required by the statute, and being then engaged in carrying interstate traffic. United States Compiled Statutes of 1901, page 3174 et seq., Act of March, 1893, entitled "An Act to promote the safety of employes and travelers upon railroads by compelling common carriers to equip their cars with automatic couplers, etc." Johnson v. Southern Pacific Co., 186 U. S., 1; Kansas City Southern Railroad Co. v. Prunty, 66 U. S. C. C. A., 163.

Glass, Estes & King, for appellee.—The act of Congress, requiring railroad cars whilst engaged in moving interstate commerce, to be equipped with automatic couplers, does not affect the defense of contributory negligence; and the appellant's own testimony showing conclusively that he was guilty of contributory negligence, the court correctly held that he was not entitled to recover; and correctly instructed the jury to return a verdict for appellee. Denver & R. G. Ry. v. Arrighi, 129 Fed. Rep., 347; Cleveland, etc., Ry. v. Baker, 91 Fed. Rep., 224.

These cars had already reached their destination, had been in the yards several days, and were then being put into a train to go a few miles south of Mena, in the State of Arkansas, to be unloaded. Under these facts, it seems to us that the cars were not being used in moving interstate traffic. Gulf, C. & S. F. Ry. v. State, 97 Texas, 274, 496.

KEY, ASSOCIATE JUSTICE.—Appellant brought this suit against appellee to recover damages alleged to have been received while he was attempting to make a coupling between two cars on appellee's railroad. He alleged in his petition that the automatic couplers on the cars had been suffered to get out of repair, in that the draw bars and couplers were out of alignment, and that the ends of the cars were brought together, the automatic couplers would not hook and fasten without one of the draw bars being pushed and held in such a position as to meet the draw bar on the other car; that in order to make the coupling he stood outside the rail on one foot, caught hold of the side of the car with one hand and the lever that lifted the pin in the coupler with the other hand, pulled back and outward, reaching in with his foot against the coupler that he wanted to hold in place, and kept his foot there until the cars came together; and just as the coupling was made his foot slipped, catching his toes between the couplers and inflicting the injuries complained of. He alleged that he was the foreman of the crew in charge of one of the switch engines in appellee's yards in the city of Mena, State of Arkansas, and was engaged in that service at the time he was injured.

He also alleged that the cars in question were being used in interstate traffic, and that by the terms of a Federal statute, it was the duty of the railroad company to have said cars equipped with automatic couplers that would couple by impact; that it had failed to do so and, by reason of such failure, was guilty of negligence, and that the service which appellant was then attempting to perform was, on account of the failure to furnish such automatic couplers, dangerous and hazardous.

The Federal statute referred to contains a clause, the effect of which is to cut off the defense of assumed risk when an employe is injured by reason of the failure to equip the cars with the couplers required by that statute; and, it is contended on behalf of appellant, that his case comes within the purview of that statute. The trial court took a different view of the matter; and, after hearing the testimony, instructed a verdict for the railroad, upon the theory that his own evidence made a case of contributory negligence and assumed risk.

It is virtually conceded on behalf of appellant that unless he has brought his case within the scope of the Federal statute he is not entitled

to recover; and this is undoubtedly true, because he stated on the witness stand, in substance, that he knew that it was very dangerous to attempt to make the coupling as he did, and knew that he was involving himself in great risk when he did so.

It is contended on behalf of appellee that while the Federal statute cuts off the defense of assumed risk, it leaves available that of contributory negligence; and that in this case the testimony fails to show that the cars referred to were being used in interstate traffic, and therefore both defenses were available. The undisputed testimony shows that the cars in question, loaded with steel rails, were shipped from Pueblo, Colorado, to Mena, Arkansas, which is the south end of the northern division of appellee's railroad. Appellee was engaged in putting down new rails on its road. It had them shipped from Colorado and consigned to it at Mena, Arkansas. When they reached the latter point the cars were not unloaded but were put in the yard and held there until the rails were needed as the work progressed, when the cars were forwarded at different times and to different points along the road. The cars in question had been in the yard at Mena for several days when appellant received instructions to prepare them to be carried forward to be used in reconstructing the track, and it was while he was performing that service that he was injured. The place where they were to be used was about twenty miles from Mena, but within the State of Arkansas.

On this state of facts we hold that the cars in question were not engaged in or being used for interstate traffic at the time appellant sustained his injuries. We do not stop to inquire whether or not a railroad engaged in transporting its own construction material is engaged in commerce at all; but, conceding that such a transaction constitutes commerce, we are of opinion that the transaction in question was not at the time appellant was injured interstate commerce. The interstate feature of the shipment terminated when the cars reached Mena. We are unable to distinguish this case from Gulf, C. & S. F. Ry. Co. v. State, 97 Texas, 274, 78 S. W. Rep., 495, in which our Supreme Court held that the transaction in that case constituted a domestic and not an interstate shipment.

No reversible error has been shown and the judgment is affirmed.

Affirmed.

TEXAS & PACIFIC RAILWAY COMPANY ET AL. v. HORNE & WARREN.

Decided June 20, 1906.

1.—Assignments and Propositions—Inconsistent Charges.

An assignment of error and proposition complaining of the charges given as inconsistent and contradictory followed by a statement giving five different instructions, embracing four pages of printed matter, without pointing out wherein the inconsistency lies, will not be considered.

2.—Connecting Lines—Delivery—Harmless Error.

In a suit for damages in the transportation of live stock over two connecting lines of railway, errors in the instructions as to what would constitute delivery by the first line to the second are harmless as to the latter, where

the verdict shows that all damages prior to the receipt of the shipment by it were assessed only against the initial carrier.

Appeal from the County Court of Bowie County. Tried below before Hon. Sam. H. Smelser.

Spoonts & Thompson, Charles S. Todd and *Marshall Spoonts,* for the Fort Worth & D. C. Ry. Co., appellant.

T. J. Freeman and *Glass, Estes & King,* for the Texas & Pac. Ry. Co., appellant.

Hart, Mahaffey & Thomas, for appellee.

KEY, Associate Justice.—Appellees brought this suit against the Texas & Pacific Railway Company and the Fort Worth & Denver City Railway Company to recover damages for injuries to a shipment of horses from Claude, Texas, to Texarkana, Texas. The plaintiff recovered $600 against the Fort Worth & Denver City Railway Company and $398.25 against the Texas & Pacific Railway Company, and both defendants have appealed.

By its first assignment of error, it is contended by the Fort Worth & Denver road that the court should have instructed a verdict for it. We overrule this assignment, because there was testimony tending to show that it was liable.

By its second assignment that road contends that a requested charge should have been given limiting its liability to $205, the value of four horses which died at Fort Worth. This assignment is also overruled, because there was testimony tending to show that other animals were injured while in the possession of that road.

The third and last assignment of the Fort Worth & Denver road charges that the court erred in giving to the jury special charges 1, 2 and 3 requested by the Texas & Pacific Railway Company. The only proposition submitted under that assignment is the general proposition that when the charge of the court is so inconsistent and conflicting as to render it impossible for the jury to find a verdict in accordance with its terms, the verdict should be set aside. The statement under this proposition consists of copies of the special charges complained of, and copies of special charges numbers 2 and 3, asked by the Fort Worth & Denver City Railway Company. Nowhere in appellant's brief is it stated in what respect or to what extent the charges referred to are in conflict. They cover four pages of the printed brief, and as counsel for the complaining appellant have not seen proper to specifically point out wherein they are supposed to be in conflict, we do not feel called upon ourselves to institute a comparison in order to ascertain if such conflict exists.

Taking up the appeal of the Texas & Pacific Railway Company, we overrule the first assignment complaining of the court's charge in reference to the measure of damages. While the charge might have been so framed as to express the measure of damages more accurately, we find no positive error in it, and do not think the jury were misled by it.

The other assignments of this appellant seeking a reversal on account of instructions given to the jury in reference to the question of delivery by the Fort Worth & Denver City Railway to the Texas & Pacific Railway, are overruled. The $600 verdict against the Fort Worth & Denver road renders it quite certain that the Texas & Pacific road was not held liable for any injury that occurred to the animals until after the shipment had unquestionably come into the actual possession of that road, and it had issued and delivered its bill of lading therefor. The testimony shows that the shipment reached Fort Worth about 2 o'clock p. m. on the 20th of October; that the Fort Worth & Denver road attempted to make delivery to the Texas & Pacific road, which the latter declined to accept; that thereafter, by contract between the two roads, the Fort Worth & Denver road caused the cars in which the animals were loaded to be carried to the Fort Worth Stock Yards, where they remained until late in the afternoon of October 21, when they were loaded upon the cars of the Texas & Pacific Railroad and carried to the depot of that road. By assessing the damages against the other road to the extent of $600, we think it is manifest that the jury held that that road alone, and not the Texas & Pacific, was liable for all injuries sustained by the animals up to the time they were placed upon the cars of the latter road. This being the result of the trial, if there was error committed in giving instructions defining what would constitute a delivery by the one road to the other, such error was harmless, as it did not injuriously affect the Texas & Pacific road.

The other assignments complaining of the action of the court in admitting certain testimony and of the verdict of the jury, are not regarded as tenable, and are also overruled.

No reversible error has been shown and the judgment is affirmed.

Affirmed.

J. P. PARKER ET UX. v. W. L. MOODY & CO.

Decided June 20, 1906.

1.—Land not Exempt as Homestead.

Appellant lived with his family upon a two-acre lot in the town of B., this State, and had resided there for many years. He was engaged in a land agency business in B. and was also a traveling salesman. He owned a tract of 20 acres of land outside of the limits of the town, which was occupied by tenants who used it for purposes of agriculture and horticulture, paying appellant part of the crop grown on it, which he used at home and sold on the market; neither he nor any member of his family ever lived on the land nor used or occupied it as a home. Held, said 20-acre tract was no part of appellant's homestead, and was therefore subject to execution.

2.—Dormant Judgment—Sale not Void.

Although the judgment under which land is sold be dormant, the sale is not void and can not be collaterally attacked.

3.—Judgment—Collateral Attack.

This suit, although between the same parties as the one in which the judgment was rendered under which the land was sold, is a collateral attack on such judgment, it being in a different court from that wherein the judgment was rendered.

4.—Homestead—Rural or Urban.

One's homestead must be either rural or urban, it can not be partly of one and partly of the other.

Appeal from the District Court of Leon County. Tried below before Hon. Gordon Boone.

Boyd, Edwards & Boyd and *Wm. Watson,* for appellants.

B. D. Dashiell and *S. W. Dean,* for appellees.—The court did not err in rendering judgment for W. L. Moody & Co., appellees, for the land in controversy, because the evidence showed that the two acres of land upon which appellants resided constituted their urban homestead, and that the land in controversy was rural, and there could be no blending of appellants' homestead rights so as to give them the benefits of a combined urban and rural homestead.

As testified to by all of the witnesses, the two acres upon which appellants resided at the date of the levy and sale, adjoined the platted portion of the town of Buffalo. Appellant lived with his family on this two acres; he maintained an office in Buffalo; for a number of years prior to the said levy and sale he was manager for the J. P. Parker Co., a mercantile establishment in the town of Buffalo, and during all these years he lived on this same two acres; he maintained a land office in Buffalo; his dwelling house was within a short distance of the church used for public worship by the town people; was within —— feet of the depot in the town, and dwelling houses of Dr. Haynie, who has an office in town; Cochrane, who is a merchant in town; Wallace, who works for Pearlstone, and a number of other houses as shown by the plot introduced in evidence and agreed to be correct were beyond and further out than the 2 acre lot occupied by appellant. As many as two churches were lying further out than this 2 acres, and some 12 or 15 negro residences were in a line between the two acres occupied by appellant and the land in controversy.

NEILL, ASSOCIATE JUSTICE.—This is an action of trespass to try title, brought by W. L. Moody & Company, appellees, against J. P. Parker and wife, appellants, to recover a certain tract of land containing about twenty acres situated in Leon County. The answer of defendants consisted of a plea of not guilty. The case was tried without a jury and judgment rendered in favor of appellees for the land in controversy.

Conclusions of Fact.—On July 9, 1903, appellees recovered a judgment in the County Court of Leon County against the appellant for $390.49, with 6 percent interest thereon from its date. From this judgment an appeal was prosecuted on a cost bond, without supersedeas to the Court of Civil Appeals, by which court it was affirmed on December 3, 1903. An execution was issued on the judgment on June 7, 1904, by virtue of which the property in controversy was duly levied on as the property of Parker and sold by the sheriff to appellees, and deed made by him to them on July 8, 1904.

The real issue in the case is whether the property was a part of appellants' homestead. It is situated in the country, without a fruit orchard, and occupied by tenants who used it for purposes of agriculture and horticulture, appellant J. P. Parker getting a part of the crop grown on it which he used at home and sold on the market. Appellants nor any member of their family ever lived on the land, used or occupied it as a home. But their residence in which they lived, was upon a two-acre lot situated within the limits of the town of Buffalo, the trial judge found as a fact, and there is evidence tending to support such a finding.

Besides the land in controversy, appellants owned several other tracts of land, in all not exceeding two hundred acres, in the country which he rented and used for agriculture purposes.

Parker was not a farmer, but at the time of the levy and sale, was, and had been for some time prior thereto, a traveling salesman or drummer for a drug company. Immediately prior to the time he commenced to pursue the vocation of drummer he was manager of the J. P. Parker Co., which was engaged in a general mercantile business in the town of Buffalo, Texas, and had been conducting such business for three or four years. During that time he lived with his family on the two-acre lot where he has continued to reside ever since. He also had and has a land agency business in the town during the same time, his office where he conducted and conducts said business being in the same town.

From these facts we conclude that the land in controversy was not, when sold under the execution, and never had been, appellants' homestead or any part thereof; but that his homestead is and was for years prior to such sale upon the two-acre lot where he had his domicile and resides and resided with his family.

Conclusions of Law.—While the judgment under which the land was sold was dormant, the sale was not void and could not be collaterally attacked. This suit, although between the same parties as the one in which the judgment was rendered upon which the execution issued under which the land was sold, is a collateral attack on such judgment, it being in a different court from that wherein such judgment was rendered. (Ayers v. Duprey, 27 Texas, 594; Boggess v. Howard, 40 Texas, 153.)

The land, not being appellants' homestead or any part thereof, its sale under the execution and the sheriff's deed thereto to the appellees vested title thereto in them.

There is no error in the judgment, and it is affirmed.

Affirmed.

ON MOTION FOR REHEARING.

The evidence being sufficient to warrant the conclusion of the trial court that the two-acre lot upon which appellants resided when the land in controversy was levied on and sold was within the town of Buffalo, and it being undisputed that the premises sued for are situated outside of the town, the principle, that a rural homestead may consist of several disconnected parcels of land, not exceeding two hundred acres,

has no application in this case; and renders it immaterial whether Mr. Parker used the land in dispute in connection with his homestead on the two acres or not, or what his business or employment was. One's homestead must be either rural or urban and can not be partly of one and of the other. The motion is overruled.

Overruled.

B. M. SMITH V. FIRST NATIONAL BANK OF FLATONIA ET AL.

Decided June 21, 1906.

1.—Deed—Grantee in esse.

A number of persons intending to incorporate met, organized by electing officers and selected a corporate name; a deed was executed to them, the grantee being designated by the intended corporate name. Held, the deed was valid in equity, at least, and did not fail for want of a grantee, although the incorporation was never effected.

2.—Contract to Provide Title.

A contract to "provide" a perfect title means only that the deed shall convey a good and perfect title. It does not include the furnishing of an abstract showing perfect title.

3.—Payment of Money—Evidence.

Without producing the books of the bank the cashier may testify to the fact that a certain item of money was placed to the credit of a certain party on the books of the bank.

4.—Evidence Without Pleading.

Facts proven but not alleged can not form the basis of a recovery.

Appeal from the District Court of Fayette County. Tried below before Hon. L. W. Moore.

Sam'l B. Dabney, for appellant.—The deed being made to the "Seguin Oil Company of Seguin and Beaumont," never incorporated, failed for the lack of definiteness in a grantee. This company, if it existed, was composed of a great number of persons, and there was no person named as a grantee or one of the grantees in whom the title might vest, in trust. The grantees in a deed, or devisees in a will, must be either artificial or natural persons, or a defined class, as the heirs of a named deceased person; but an instrument, purporting to be a deed to such an association merely, comes within no exception to the rule and is void because the association can not take in trust (as plainly intended by Lane, the grantor in this case) for its constituents, or to carry out any plan; and because not being to any named person or persons, direct, the deed is void for lack of defined grantees. Baptist Association v. Hart's Executor, 4 Wheaton, 1; Green v. Dennis, 6 Conn., 293, 16 Am. Dec., 59, 63, 64; Hornbeck v. Westbrook, 9 Johnson's Reports (Common Law), 73; Jackson v. Cory, 8 Johnson's Reports (Common Law), 385; Winter v. Stock, 29 Cal., 407, 89 Am. Dec., 57; Moreau v. Saffarans, 3 Sneed (Tenn.), 595, 67 Am. Dec., 582; Morris v. State, 84 Ala.,

457; 1 Devlin on Deeds, sec. 190, edition of 1887; 9 Am. and Eng. Ency. of Law, 134, second col. of notes (2d ed.).

Stipulations as to the persons to be engaged in an enterprise and the capacity in which they are to act and their degree of interest, whether direct or indirect, are, in the highest sense, of the essence of the contract and, unless they are exactly complied with, the contract was not formed. National Bank v. Hall, 11 Otto, 50; Grant v. Naylor, 4 Cranch, 224.

On meaning of word "provide" in stipulation made by King that the money should be held in trust until perfect title was "provided" by vendor; and that the word means "to create," "to supply," "to cause to see in advance," "to prepare," "to exhibit;" State v. Brownson, 94 Texas, 440, Am. and Eng. Ency. 23, 90, and notes (2d ed.); Worcester's Dictionary; Webster's Dictionary; also consider meaning of Latin original in this case—"To cause to foresee a perfect title."

That a contract to make "a good and perfect deed," or convey by "perfect title," and a fortiori "to provide" a perfect title throws upon the vendor the duty to exhibit a perfect title, and is not complied with by a tender of a deed formally correct. Fant v. Wright, 61 S. W. Rep., 520; Feemster v. May (Miss.), 53 Am. Dec., 84.

That a vendee is not bound to accept a deed, or to pay for the land, and may rescind when the title is not merchantable, though there be no specific contract, and a fortiori when the vendor's exhibit of title does not show title. Demaret v. Bennett, 29 Texas, 267; Green v. Chandler, 25 Texas, 148; Roberts v. McFaddin, 74 S. W. Rep., 109.

A check was the best evidence, or, if there was no check, the books of the bank, or if these could not be brought into court, as books of a public institution, then a copy of the account covering this matter from the books was the best evidence. Arnold v. Penn, 32 S. W. Rep., 354; Watson v. Boswell, 61 S. W. Rep., 409; Thompson Saving Bank v. Gregory, 59 S. W. Rep., 623-4; Greenleaf, sec. 93.

Brown & Lane, for appellees.

REESE, ASSOCIATE JUSTICE.—This is a suit by B. M. Smith against the First National Bank of Flatonia and T. T. McCommon to recover $1,050 and interest upon the following facts, as alleged in plaintiff's second amended original petition and supplemental petitions.

Plaintiff and a number of other persons by subscription made up $1,050 for the purpose of investing the same, with other persons, in the purchase of a tract of oil land in Jefferson County, Texas. The other persons subscribing to this $1,050 have transferred their claims to plaintiff. When collected the money was remitted to the First National Bank of Flatonia accompanied by a letter to its president, T. T. McCommon. The bank was acting as preliminary treasurer holding the money subscribed until it should be authorized by the proposed organization to pay out the same in the purchase of the land. It is alleged that the land was never purchased by the proposed organization nor was the bank ever authorized to pay out the money or to buy any land, nor was the proposed corporation ever created, but on the contrary at a meeting held at Seguin, Texas, of persons principally interested, in May or June, 1901, at which one Willeford, cashier and acting for the

bank, was present, the purchase of the land under consideration was disapproved and the proposed enterprise abandoned. It is alleged that the terms upon which the money was remitted were stated in the letter accompanying the remittance and addressed to McCommon, president of the bank, as follows:

"In accordance with several conversations with your representative, Mr. W. R. King, over telephone, relative to the organization of the oil company, in which I am told yourself, Mr. Jonathan Lane and others associated with you are chiefly interested, I send you by today herewith $1,050 currency, to cover one and one-half shares of organization stock, subscribed by following named persons."

The letter then proceeds to state the subscribers who have been named above, and then proceeds: "In effecting permanent organization the Victoria Contingent will be gratified by being remembered in the directory," and suggested certain names as directors. Prompt acknowledgment of receipt was requested. The bank through Willeford, its cashier, promptly acknowledged receipt of the money saying: "This is to say this fund is held by this bank for the parties until company is organized and you can so show each one."

It is further averred that the money was sent in the promotion of an enterprise in which Jonathan Lane was one of the persons chiefly interested, that he is now and was at the time a lawyer and man of large affairs, of reputation and character and the money was remitted to be used in an enterprise in which he was and should be concerned, and that plaintiff and his associates did not know that he was not concerned in this enterprise, and not a subscriber to its stock, until after the defendants converted the money to its own use. That the money has been paid over to one T. W. Lane in purchase of certain land in Jefferson County, and that said Lane was unknown to plaintiff and his associates and he never intended to enter into any enterprise with him. That Jonathan Lane was not in fact interested in the enterprise and did not subscribe for any of the stock, and for that reason defendant bank had no authority to pay over the money; that the enterprise was never consummated, nor was any corporation or other organization ever effected, and no authority given by the inchoate organization to the bank to pay over the money, but on the contrary the inchoate organization was abandoned after having directed the bank not to pay out the money and after the bank had agreed not to do so.

In a second count of the petition it is alleged that it had been proposed to purchase a tract of land in Jefferson County having supposed oil possibilities, but the plaintiff and his associates assumed that Jonathan Lane was concerned in the enterprise. The land was claimed by T. W. Lane, that it was understood that the title to the land should be examined by competent counsel; that an abstract was prepared and examined by Dibrell & Mosheim, attorneys, by whom the title was reported as not good and merchantable. That if the contract of purchase was binding upon plaintiff and his associates the same provided for an examination of title which was to be satisfactory to the proposed purchasers and their counsel which was known to defendants, and the title being bad and not merchantable the consideration had failed and the

defendant had no authority to accept a deed from Lane or to pay out the money, and had no authority to pass upon the title or pay out the money even though the title was good.

Defendants answered by general demurrer and special exception, which need not be more specifically mentioned, and generally denied all the allegations of the petition not specially admitted, setting out a history of the transaction. The basis of the suit is substantially as follows:

On or about April 19, 1901, one W. R. King undertook to secure money from persons who might desire to subscribe a sufficient sum with which to buy from T. W. Lane fifteen acres of land in Jefferson County, known as lots 1, 2 and 5, block D, Charles Williams survey, supposed to be oil producing land, said Lane offering to sell for $10,500. The plan upon which King proceeded was to form a company of persons who should buy the land and operate oil wells thereon.

The plan presented by King was that the money was to be divided into fifteen shares of $700 each, called organization stock. W. R. King, E. A. Arnim, for Arnim & Lane (a firm composed of E. A. Arnim and Jonathan Lane), T. W. Lane, W. Willeford and T. T. McCommon, each should and did take one share and King was to dispose of the other ten shares. When disposed of the oil company was to be organized whose capital stock should consist of said fifteen acres of land, at a valuation of $150,000 represented by 150,000 shares at $1.00 each, of which 75,000 shares were to be held by the holders of the fifteen shares of organization stock, and the remaining 75,000 shares to be called "Treasury Stock," and a sufficient amount thereof sold by the company to raise the money to develop the property. The holders of the "organization stock" were to elect the officers and control the oil company when organized. The money collected by King from sale of "organization stock" should be deposited with the defendant bank until all of the shares were sold, when T. W. Lane should make and deliver a deed for the land to the contemplated oil company and the money should be paid over to him.

On or about April 23, 1901, the Victoria people (being plaintiff and those whose interests have been assigned to him) acting as a body, caused one J. E. Buchanan to remit to defendant McCommon, president of defendant bank, $1,050 to cover one and one-half shares of organization stock, accompanying the remittance with the letter heretofore referred to, receipt of which was acknowledged by Willeford, cashier of the bank, as follows: "I have just been asked to come to Seguin this eve to organize and your letter will be placed with them. I have not time to write each one in your letter but this is to say this fund is held by this bank for the parties until company is organized, and you can so show each one." The other eight and one-half shares were disposed of by King and thereby the persons so taking and paying for the fifteen shares of organization stock formed a copartnership or company to buy the land.

On or about April 24, 1901, these persons met at Seguin and organized themselves into a company called the "Seguin Oil Company of Seguin and Beaumont" with capital stock of $150,000, and elected a board of managers or directors, among them Theo. Buhler, selected by the "Victoria Contingent" and they elected a president, vice-president,

second vice-president and manager, and a secretary and treasurer, and thereupon T. W. Lane executed and delivered to the company a warranty deed for the fifteen acres of land, which was dated April 25, 1901, and filed for record in Jefferson County on April 27, and thereupon the defendant bank, in accordance with the understanding of all of the parties, paid over the money to Lane. After this organization the company proceeded to advertise and claim that it was the owner of said land in the "known oil fields of Beaumont" and that not until after the money had been paid over to T. W. Lane and after there was a failure to find oil by persons making borings in the neighborhood was there any intimation from plaintiff or those associated with him that they wanted their money returned to them.

Defendants deny that it was contemplated by any of the parties that they or either of them should receive the deed from T. W. Lane or that they should pass upon the merits of the title, but that the understanding was that the bank should hold it and pay it over to Lane when the company was organized and the deed made. It is alleged that Lane had a perfect title and that the deed passed a perfect title to the company, and that it was executed and delivered upon the requirement of King, it having been contemplated by the parties paying in the money that this should be done as soon as the money was all paid in and an organization perfected, but before the company was incorporated.

In reply to this answer of defendants plaintiff filed lengthy supplemental petitions embracing a general demurrer and many special exceptions, and reiterating and emphasizing the allegations of the petition that the Victoria people were induced to go into the scheme by the representations that Jonathan Lane was chiefly interested in it, and their belief that he was so interested; that it was understood that a corporation was to be organized and the money paid over to Lane after the title was examined and approved, which was never done, and that the deed was executed and delivered without the knowledge of any of the persons associated in the enterprise except those co-operating with defendants and T. W. Lane in the withdrawal of the money. It is alleged that the title to the land is not good and was incomplete in Lane, as shown by the abstract submitted by him, and that at the meeting in June Willeford was notified not to pay over the money to T. W. Lane, at which time he stated that the money was still in the bank, none of the persons present except Willeford and his co-conspirators knowing that the deed had been then executed.

All of the demurrers and exceptions of plaintiff were overruled by the court, and upon a trial by the court judgment was rendered for defendants, from which plaintiff appeals.

The following are the material facts in the case, taken from the findings of fact of the trial court, which are approved:

During the great excitement incident to the discovery of oil near Beaumont, Texas, in the spring of 1901, W. R. King, about the 19th day of April, 1901, undertook to organize an oil company. His scheme was as follows, namely, T. W. Lane, who was the owner of, and had a good title to lots numbers 1, 2 and 5, in block D of a subdivision of the C. Williams league in Jefferson County, Texas, containing 15 acres of land situated about four miles from Spindle Top and supposed to be

oil producing land (said 15 acres of land are those which are fully described in the pleadings of defendants in this suit), was offering to sell the same for $10,500; that said King undertook to raise said sum of $10,500 with the intent to buy therewith said land. This he did by securing subscriptions from such persons as he could induce to take what he was calling "organization stock." That there were to be 15 shares of this organization stock; that the purchaser or purchasers of each of these were to pay therefor $700, thus making up the $10,500 to be paid for said 15 acres of land; that said land when bought was to belong to and be the property of the purchasers who were to be "ground floor people," an organization company or association, and were to own the property in the proportion that their several contributions bore to the $10,500; that this company or association of persons was not to be incorporated but they were simply to buy the land with the intent of making it the "ground floor" or basis of a capital stock of a corporation which they contemplated organizing afterwards; that, after they should organize their "ground floor" company and purchase said land, they would organize an incorporation and secure a charter, which corporation was to have a capital stock of $150,000, this land was then to become the property of the corporation and to be estimated as of the value of $150,000; that the stock of the corporation, when organized, should be divided into 150,000 equal shares of $1.00 each; that 75,000 of said shares should be distributed among the owners of said 15 acres or of said 15 organization shares, in the proportion of 15 to 75,000, and the remaining 75,000 shares should be called "treasury stock" of which sufficient should be, by the corporation, sold to raise money to develop the property, the 15 acres of supposed oil producing land; that the owners of each share of original organization stock should have 5,000 shares of the capital stock and should elect the corporation's officers and have complete control of the corporation's affairs, but it was understood between the said King and those from whom he obtained money with which to buy said land that as soon as the necessary amount should be raised, by the "ground floor people" with which to buy said 15 acres of land, and it should be bought, the money contributed by the purchasers of organization stock should be paid over to the said T. W. Lane for the purpose of buying the said 15 acres. The scheme was that T. W. Lane should, and he did take one of the organization shares; that Arnim & Lane, a copartnership composed of E. A. Arnim and Jonathan Lane, should and they did take one of said "ground floor shares;" that said King should also take, which he did, one of the said "ground floor shares;" that T. T. McCommon and W. Willeford should, and they each did, take one of the said "ground floor shares;" that the remaining ten shares should be sold by said King, and this he did do between the 19th and 23d day of April, 1901.

At the time he, said King, was selling organization stock, the purchasers were all exceedingly anxious to get in on what was called the "ground floor." The fact of organization of the contemplated company became known at Victoria, Texas, and a number of persons at and about that place, which are called in these proceedings the "Victoria contingent" bought one and a half of these organization or "ground floor" shares and paid therefor $1,050; among the "Victoria conting-

ent" was the plaintiff, who contributed $300, and whatever interest, if any, the other persons composing said contingent have in the money contributed by them, has been assigned to plaintiff. That King sold 10 remaining "organization shares" as it was contemplated he should; that while he was selling he instructed those who were buying, to remit the money they were paying for the "ground floor" shares to defendant bank, telling them that said bank would hold the money in trust until the company was organized and a deed would be made by T. W. Lane, which would convey to said organization or "ground floor" company good and perfect title to said 15 acres of land. It was also understood between King and the purchasers of "ground floor" or organization stock, that he and the purchasers of 10 shares which were being sold by him, should have control and management of the company's business affairs; that on the 23d day of April, 1901, one J. E. Buchanan, who was the agent of plaintiff and his Victoria associates and who "were acting together and as a body and jointly," wrote a letter to defendant McCommon, who was president of the defendant bank, in which a draft for said $1,050 contributed by the "Victoria contingent" was inclosed, in which he said that in accordance with several conversations with your representative, Mr. W. R. King, over telephone, relative to the organization of an oil company "in which I am told yourself, Mr. Jonathan Lane and others associated with you are chiefly interested, I send you herewith one thousand and fifty dollars to cover one and one-half shares of organization stock subscribed by following named parties in amounts shown opposite each name." (Then follows a list of the contributors with the amount contributed by each.) The letter then proceeds: "In effecting permanent organization the Victoria contingent will be gratified by being remembered in the directory, and I would recommend the names of Messrs. Theo. Buhler, cashier First National Bank and Mr. D. T. Forbes, V. P. & G. S. N. Y. T. & M. Ry. Co., as good men and acceptable to the interested parties here." That on the 24th of April, 1901, Willeford, the cashier of the defendant bank, wrote to said Buchanan saying: "Yours and $1,050 duly at hand and will be disposed of as stated. I have just been asked to go to Seguin this eve to organize, and your letter will be placed with them. I have not time to write to each one in your letter, but this is to say this fund is held by this bank for the parties until company is organized, and you can so show to each one." That on the evening of April 24, 1901, the required money having been paid in to the defendant bank, the persons who contributed money to buy said 15 acres of land for a "ground floor" met in Seguin, Texas, and proceeded to organize; they assumed and adopted the name of "The Seguin Oil Company of Seguin and Beaumont, Texas." They elected a president (Walter Nolte), a vice-president, general manager, secretary and treasurer, and a full board of directors or managers; that in this meeting the Theo. Buhler, a banker of Victoria, Texas, who had been recommended by the said J. E. Buchanan, was elected one of the board of directors. At this meeting most of the contributors of the money necessary to buy said 15 acres were present and participated. That the officers elected at this meeting caused letter heads to be printed, which they used in correspondence, by which it was shown that "The Seguin Oil Company of Seguin and Beaumont,

Texas," owned lots 1, 2 and 5 in block D in the C. Williams survey in the known oil fields of Beaumont. Said letter heads also showed the names of its president and other officers, and the board of its directors; they showed that its capital stock was $150,000. The said officers also caused receipt books to be issued for stocks, and put in the field to sell the stock agents who were actively selling until the 30th of April, 1901, at which time sales were stopped. There was great excitement at this meeting, and all were anxious to have action taken as speedily as possible. King was present at the meeting and saw and heard what occurred. On the next train after the adjournment of this meeting, two of the directors it had elected went to Beaumont; and upon adjournment of the meeting King telegraphed to T. W. Lane, who was at Beaumont, that the organization had taken place, that the name assumed by the company was "The Seguin Oil Company of Seguin and Beaumont, Texas," that he, Lane, should make and place upon record a deed conveying to said company said 15 acres, and telling him that a committee was going on the next train from Seguin and Beaumont to look after same; that thereupon the said T. W. Lane did execute a deed by which a good and perfect title to the said 15 acres was conveyed to the purchasers of the organization stock in their assumed name of "The Seguin Oil Company of Seguin and Beaumont, Texas." Said deed was dated 25th of April, 1901, was properly acknowledged for record on the 27th of April, 1901, and on that day, by said Lane, was filed for record with the county clerk of Jefferson County, Texas. It was duly recorded in the deed records of Jefferson County, Texas, on the 10th of May, 1901, and was forwarded to and placed in the actual personal possession of Walter Nolte whom the purchasers of the organization stock had duly elected as president of "The Seguin Oil Company of Seguin and Beaumont, Texas;" that same was received by him on the 25th of May, 1901.

That there was no contract or understanding or agreement between said King and Lane, or between them or either one of them and any of the persons who subscribed the money with which to buy said 15 acres of land, to the effect that Lane should furnish an abstract of the title to said land, either to said oil company or to any one for it, which should be submitted to attorneys or to any other person, or that the title to said land should be satisfactory to said company, or to its attorneys, or to be approved by its attorneys before the delivery of the deed should take place. Nor was any other person appointed by the parties to pass upon the title. That the contract was only that the deed should convey a good and perfect title to the land; and after the organization of said "ground floor" company and the furnishing of such deed by said T. W. Lane, the understanding was, that the defendant bank should pay over the money deposited, as hereinbefore stated, to the said T. W. Lane as payment of the purchase price agreed upon for said land.

At the time said money was deposited, the said T. W. Lane had good and perfect title to said land; that he had good and perfect title up to the time he made said conveyance; that the delivery of the deed was such as was contemplated by the parties and passed to said purchasers good and perfect title to said land; that after the delivery of said deed, and organization of said company, as above set forth, said bank, as it

was understood it should do, did pay over said money to said T. W. Lane as the price for the said land.

At the time of the contribution of the $1,050 by the "Victoria contingent" it was not contemplated by any of the parties interested in the scheme that Jonathan Lane should be active in the management of said company, but, on the contrary, it was understood by all parties that the purchasers of the 10 shares of "ground floor" stock which were sold by King as before stated, should themselves with him have the management and control of the business affairs of the enterprise and should elect officers as they saw fit.

Between the 3d and 8th of May, 1901 (exact date uncertain), a meeting of the persons to whom King had sold the 10 shares of "organization or ground floor stock" was held in the bank of Walter Nolte in Seguin, Texas; that at this meeting a representative, one of the Victoria contingent, was present and participated; that at this meeting Mosheim, of the law firm of Dibrell & Mosheim, reported that an abstract which the company had procured, did not show a good title to the 15 acres of land in T. W. Lane; that thereupon the proposed purchasers resolved not to take the land, to abandon the enterprise, demanded that their money be returned to them, and refused to allow a request made by Willeford that Lane be allowed further time in which to show that he did have, and that his deed of 25th of April, 1901, did convey to said purchasers, a good and perfect title to said 15 acres of land.

Assignments of error from 1 to 5 present objections to the action of the court in overruling special exceptions to certain portions of defendants' answer, in which it is alleged that it was the understanding of the parties that a permanent organization was to be effected by the persons holding what is called the organization stock and that when this was accomplished a deed was to be made to this organization. Coupled with these assignments is another which is addressed to the conclusion of law of the trial court that T. W. Lane on the 25th of April, 1901, executed a deed by which a good and perfect title to the land was conveyed to the organization.

None of these objections to the answer presented by these special exceptions can be entertained. Defendants in their answer set out fully and definitely the plan or scheme under which the parties proposed to operate, according to which it was understood and agreed that when the 15 shares of what is called organization stock were all taken, the persons taking the same should effect an organization preliminary to the procuring of a charter for the proposed oil company, and that it was to this organization, and not to the corporation when chartered, that the deed was to be made. It is specifically stated that the holders of this organization stock were to compose this organization which was to be a "co-partnership and company to buy land," and it is also specifically averred that the deed when executed and recorded was delivered to the company. Under the facts alleged in the answer, the execution of the deed and having it recorded under the direction of King, which is alleged to have been done, was a sufficient delivery. (Newton v. Emerson, 66 Texas, 147.)

The proposition presented under these assignments that the deed to

the "Seguin Oil Company of Seguin and Beaumont" failed for lack of definiteness in a grantee can not be sustained. Until the corporation was actually created, by the granting by the proper authority of a charter, the persons co-operating in the steps preliminary to the incorporation were a co-partnership and had agreed to assume the name of the "Seguin Oil Company of Seguin and Beaumont" and as such had effected an organization as is required before a charter can be obtained. If it was contemplated to form a corporation and obtain a charter upon the basis of this 15 acres of land as the sole capital there must necessarily have been a conveyance of the land to the preliminary organization before this could have been done. The statute requires that there be some sort of a preliminary organization inasmuch as the application for the charter is required to state, among other things, the number of directors and the names of those for the first year. (Art. 643, Revised Statutes.) It is required also to be shown that at least ten percent of the authorized capital has been paid in. (Art. 642, subdivision 56, Rev. Stats.) With no other capital paid in but this 15 acres of land, as to which there seems to be no dispute, necessarily the parties must have contemplated that the land was to be conveyed to the persons forming the corporation before application for charter was made. Otherwise we would have to assume that this affidavit was to be made without any regard to the truth of the matter. It can not be said that the $10,500 was to be used as a basis, for the proposed corporation was to have a capital of $150,000 and the most elastic conscience would hardly allow one to state that the $10,500 was ten percent of this amount. The deed to these holders of organization stock under the name they had assumed was valid in equity, at least, and did not fail for want of a grantee. (Frost v. Wolf, 77 Texas, 455; 4 Rose's Notes, Texas Reports, p. 213; Dunlap v. Green, 60 Fed. Rep., 246, and authorities cited.)

What has been said in this connection also disposes of the seventh assignment of error.

The eighth assignment can not be sustained. The conclusions of fact of the trial court that King did raise $10,500 by subscription for 15 shares of organization stock, is fully supported by the evidence. That part of this money was paid to Lane in the adjustment of the business transaction between T. W. Lane and Arnim & Lane and McCommon could not affect the rights of plaintiff and his associates. The essential fact, so far as they were concerned, was that the land should be paid for and a clear deed executed conveying title to themselves and their associates in the pool. By what sort of arrangement other parties paid their proportion was immaterial, insofar as concerns any of the grounds urged by plaintiff in his petition for the recovery of the money paid by him and his associates.

The court allowed the witness King to testify, over the objection of appellant, "that he thought that he did tell Buchanan that Jonathan Lane was a partner of Arnim & Lane as he had always understood the fact," to which appellant excepted. There was no error in the ruling especially in view of the fact that the trial was before the court.

The tenth, eleventh and twelfth assignments are without merit. The finding of fact complained of in the eleventh assignment "that the Victoria contingent did not contemplate or understand that Jonathan

Lane should be active in the management of the company," is fully supported by the evidence, and such finding is adopted by us. Upon this hypothesis it was unnecessary to find further as a conclusion of law whether or not there was a breach of the contract by the use of the money by the proposed enterprise in which Jonathan Lane was not specially interested, and whether or not the interest which he may have had in Beaumont speculation through Arnim & Lane complied with the contract that he should be specially interested. The entire contention of plaintiff with regard to the fact that Jonathan Lane was not "specially interested" in the enterprise rests upon a bare statement in the letter of Buchanan, accompanying the remittance of the money to McCommon for the "Victoria contingent" heretofore set out, in which he speaks of the "organization of the oil company in which I am told yourself, Mr. Jonathan Lane and others associated with you are chiefly interested." This was certainly not more than a representation that the writer had been told that Jonathan Lane was interested in the same way and to the same extent as McCommon and the others interested with him. It falls far short of being even a statement that the writer of the letter had been informed that Jonathan Lane was to be specially interested in the management, and very far short of making it a part of the contract and a condition of the Victoria subscription that he was to be so specially interested. He does not appear to have been present at the organization meeting in Seguin in April, which closed amid great enthusiasm, nor at the subsequent meeting in May or June at which objection was first made to paying over the money on the sole ground that the title was not good. We think this statement in Buchanan's letter to McCommon can not bear the burden which appellant seeks to make it carry, and it does not appear reasonable that the parties themselves should have so understood it. The trial court placed a just construction upon it in holding that the fact that Jonathan Lane was interested through the subscription of Arnim & Lane, of which firm he was a member, for one share of organization stock, was a sufficient compliance with whatever representation was made in the letter of Buchanan to McCommon.

So far as concerns the point raised in the twelfth assignment about McCommon not having been "specially interested," this was immaterial under the pleadings of appellant, which do not refer to this fact at all.

It is a sufficient answer to the assignments of error from thirteenth to seventeenth that we find as a fact, adopting the finding of the trial court, as set out in this opinion, that there was no contract that Lane should furnish an abstract of title, or that the same should be approved, before the money was paid over, but only that the deed should convey a good and perfect title, which the trial court found it did do, which finding we approve. "Providing" a perfect title meant no more than this. An abstract was prepared and presented to the organization which was examined by attorneys and rejected, but Willeford's plea for time to have, not the title, but the abstract corrected or completed was rejected. At any rate when T. W. Lane executed a deed to the company conveying a perfect title to the land every requirement of the agreement was complied with to authorize the paying over of the money by the bank. The parties had no right to demand more than this, not a good

deed merely, but a deed conveying perfect title. There was no guarantee that the land should be oil producing.

What has been last said, with the added statement that we have examined carefully the objections made by appellant to the title and do not think they are tenable and that we agree to all the findings of the trial court as to the title, disposes also of the eighteenth, nineteenth and twentieth assignments of error.

The twenty-first, twenty-second, twenty-third and twenty-fourth assignments are grouped together. None of them can be sustained. No order or check was necessary to authorize the bank to pay over the money. The evidence shows that it was not so contemplated, and no such issue is made by the pleadings. We think it is a fair deduction from the evidence that King, on account of his relation to the parties, upon the organization at Sequin in April, was authorized to so notify Lane and to request him to execute the deed and have it recorded.

There was no error in permitting the witness Willeford to testify that the money paid over by the bank was credited to, turned over or paid over to Lane, as set out in the twenty-fifth and twenty-sixth assignments. The deed was executed, which was an acknowledgment of receipt of the money as between Lane and the grantees. There is no suggestion that Lane claims otherwise. The cashier of the bank could properly testify that it was credited to him without being required to produce the books. If not, the error was harmless and immaterial.

The twenty-seventh assignment presents what would be a serious question if the plaintiff's pleadings had been so framed as to present the issue. By his pleadings appellant seeks to recover back the money turned over to the Flatonia bank on three grounds:

First. Because Jonathan Lane was not chiefly interested in the proposed enterprise, as it was understood he should be.

Second. Because the corporation was not created and there was no authority to make the deed except to the corporation, and

Third. Because the abstract of title showed that T. W. Lane's title was not good.

The fact that McCommon, Arnim and Willeford were themselves the real owners of the 15 acres of land which it was proposed that appellant and other "ground floor" people in connection with McCommon, Arnim and Willeford should buy from T. W. Lane, thus creating what appellant terms a "sub-cellar" under the "ground floor," and that the 15 acres for which it was proposed the parties should pay $10,500 was a part of a tract of 85 acres which T. W. Lane, acting for himself and McCommon, Arnim and Willeford, had just bought for $12,500, is not referred to in any way in the pleadings. Facts proven but not alleged can not form the basis of a recovery. The trial court seems to have taken the same view of this question, as shown by the fourth conclusion of law, where the court is careful to find that "As the pleadings stand" there is no fact deducible from the evidence to support a recovery by plaintiff.

We find no error in the record authorizing a reversal and the judgment is affirmed.

Affirmed.

ON REHEARING.

Our attention has been called, upon motion for rehearing by appellant, to an inaccuracy in our opinion, in which it is stated "That the plaintiff (appellant) pleaded that the money had been paid over to one T. W. Lane in purchase of certain land in Jefferson County." The statement should have been that "plaintiff pleaded that defendants (appellees) claimed that the money had been paid over to one T. W. Lane in the purchase of certain land in Jefferson County." The inaccuracy referred to is here corrected.

At the request of appellant the following additional facts are found:

A pool had been formed composed of Arnim & Lane, Willeford, McCommon and T. W. Lane to trade in oil lands. Arnim & Lane, McCommon and Willeford put up the money and T. W. Lane did the trading, taking deeds to lands bought in his own name. They were all equally interested in the profits of such trading in the proportion of one-fourth to Arnim & Lane, and one-fourth to each of the other three. The losses were to be shared by all of them equally except T. W. Lane, who was not to be responsible for losses.

Under this arrangement T. W. Lane bought a tract of 85½ acres of land, of which the 15 acres in controversy here was a part, paying therefor $12,825 and taking the deed in his own name.

The money agreed to be contributed by Arnim & Lane, Willeford, McCommon and Lane was never in fact paid into the bank as part of the $10,500 with which to pay for the 15 acres, nor was the share of Arnim & Lane, Willeford or McCommon ever in fact paid over to T. W. Lane, but their shares were left to be adjusted in the settlement with T. W. Lane of the business in which they had embarked as aforesaid.

Motion overruled.

Writ of error refused.

CITY OF HOUSTON v. I. KAPNER.

Decided June 21, 1906.

1.—Conclusions of Fact and Law—Voluntary Filing by Judge.

Conclusions of fact and law voluntarily filed by a trial judge can not be given the force and effect of conclusions filed upon request of either party as provided by the statute, and may be ignored by the party appealing. Rev. Stats., art. 1333.

2.—Suit to Cancel Deed—Evidence Held Sufficient—Time—Essence of Contract.

Plaintiff conveyed to the city of H. a strip of land upon the sole consideration of the undertaking and agreement on the part of the city to convert the same into a street and to build or assist in building a bridge across an adjacent bayou, all of which was to be done within a certain time specified. Evidence considered, and held to show that time was of the essence of the contract, and sufficient to sustain the judgment of the court cancelling the deed.

Appeal from the District Court of Harris County. Tried below before Hon. Norman G. Kittrell.

T. H. Stone and *W. J. Howard,* for appellant.—Unless it appears therefrom by its clear and unequivocal terms that time is of the essence of a contract, and that it was the intention of the parties at the time such contract was made that, unless it should be performed promptly at the time therein specified, forfeiture would result, such construction will not be given it, but a reasonable time will be permitted the obligee in which to fully comply with the contract. Primm v. Barton, 18 Texas, 226; Younger v. Welch, 22 Texas, 425; Scarborough v. Arrant, 25 Texas, 135; Hanks v. Pickett, 27 Texas, 99; Hild v. Linne, 45 Texas, 478; Kirchoff v. Voss, 67 Texas, 320; Watson v. Walker & Co., 67 Texas, 653; Seley v. Texas, St. L. Ry. Co., 2 Texas App. Civ., sec. 87.

W. G. Love and *G. J. Kapner,* for appellee.—In a suit to rescind an executory contract for the conveyance of land, where no part of the purchase money is paid in cash, but the whole of the consideration is to be paid or performed in the future, within a specified time, the vendor is entitled to rescind upon the failure of the vendee to pay the purchase money or perform the conditions upon which the title is to vest, within the time specified in the deed, and in such case no equities exist in favor of the vendee. Lanier v. Foust, 81 Texas, 189; Efron v. Burgower, 57 S. W. Rep., 306; Browning v. Estes, 3 Texas, 477; Allen v. Mitchell, 13 Texas, 378; Wheatley v. Griffin, 60 Texas, 213; Secrest v. Jones, 30 Texas, 603; McAfee v. Robertson, 43 Texas, 597; Keys v. Mason, 44 Texas, 144; Ransom v. Brown, 63 Texas, 188; Walker v. Emerson, 20 Texas, 706; Estes v. Browning, 11 Texas, 237.

PLEASANTS, ASSOCIATE JUSTICE.—This suit was brought by appellee to cancel a deed made by him to appellant on February 22, 1904, conveying to it for street purposes a strip of land described in said deed as follows: "Beginning at a point where the south line of what is known as the Gable tract intersects with the west line of Gable Street, as it now exists, running thence in a westwardly direction along the south line of said Gable tract for a distance of ten feet, and thence in a northerly direction, more or less, to Buffalo Bayou; thence down Buffalo Bayou with its meanders for a distance of forty feet, opposite the east line of Gable Street as it now exists and is located; thence south to an intersection with the east line of said Gable Street as it now exists, forty feet, more or less; thence west to the west line of Gable Street, as the same is now located; thence south along the west line of Gable Street, as now located, to the place of beginning."

The substance of the allegations of the petition are thus accurately stated in appellant's brief:

"That by the terms and recitals in said deed, said property was conveyed by plaintiff to defendant for the purpose of enabling it to widen and extend Gable Street in front of plaintiff's other property situated in the vicinity of the property so conveyed. That said deed contained the stipulation that said plaintiff conveyed said property in consideration of the promise of the city of Houston that it would, within twelve months from October 12, 1903, cause to be constructed and completed an iron or steel bridge across Buffalo Bayou at a point opposite Gable Street, in the Second Ward, connecting with McKee Street, in the Fifth Ward of

said city, and the further consideration that the city would extend Gable Street so as to utilize for street purposes the land conveyed, and have all obstructions removed from said land within twelve months from the date of said deed, and have said property opened up and utilized as a street. That said deed contained a stipulation that said deed was made upon condition that the city of Houston performed the covenants stated in the deed, and that should it fail to assist the county of Harris in the construction of said bridge, and for that reason the bridge should not be built and completed as therein specified, and that should the city fail to have the land conveyed, cleared of obstructions and utilized as a part of Gable Street, within twelve months from October 12, 1903, the said conveyance should be void, and all rights conferred upon said city should revert to plaintiff. That the plaintiff received no consideration whatever for the execution of said deed, and that it was not intended he should receive any consideration, except such as he would receive on account of having the land described in the deed converted into a public street, with a bridge across Buffalo Bayou at the foot of said street when so extended. That at the time said deed was executed, Gable Street was a narrow street in width, including sidewalks, extending from Race Street in a northerly direction about 388 feet from Buffalo Bayou; that there was no outlet north of its terminus, and that the portion of the street then in existence was too narrow for use as a public thoroughfare; that the plaintiff owned and still owns about 10 acres of land lying along the north and west line of Gable Street, and extending to Buffalo Bayou; that plaintiff desired to have Gable Street widened ten feet, and have it extended from its terminus to Buffalo Bayou, in order that he might utilize said street so made in front of his property as a means of ingress and egress; that if the city had complied with its covenants contained in said deed, plaintiff's property abutting thereon would have been greatly benefited. That the time within which the said covenants were to have been performed has long since expired, and defendant has failed and refused to comply with the terms of said deed; that it failed to have the land described in said deed cleared of obstructions and utilized as a street, and has refused to extend Gable Street, and refused to assist Harris County in building a bridge across Buffalo Bayou; that while it is true Harris County did construct a steel bridge across Buffalo Bayou opposite McKee Street, same was built without the assistance of the defendant, and was not completed within the time stipulated in the deed. That instead of said city utilizing that portion of the land conveyed to it in the deed, extending from the terminus of Gable Street about 388 feet northward to Buffalo Bayou, said defendant permitted Harris County to utilize the same for the purpose of constructing thereon the trestle work extension of the bridge across said Bayou, which is constructed at a great elevation above plaintiff's land and above the grade line of Gable Street, as the same would have been constructed had the said property been utilized for the purpose of a street; that said abutment operates as an obstruction to plaintiff in the use and enjoyment of his property. That the city failed, neglected and refused to remove the obstructions from the strip of land ten feet in width, running parallel with Gable Street, and failed and refused to widen said Gable Street so as to include said 10 foot strip, so that a

portion of plaintiff's property is still situated upon said narrow street or same abuts upon the narrow strip of land intervening between it and what is now Gable Street. That the said covenants contained in the deed were to be performed, and were expressly made the essence of the contract by the terms of said deed. Plaintiff prayed that he have judgment against the defendant, cancelling said deed, and rescinding the executory contract of sale or conveyance, evidenced thereby, and that he recover the title and possession of the property and premises described in said deed, and that his title to the same be quieted and vested in him." The suit was filed on December 6, 1904.

The defendant answered by general and special exceptions, the special exceptions being as follows:

"(1) That it was not alleged therein that time was of the essence of the contract which plaintiff was seeking in his petition to have rescinded.

"(2) That plaintiff did not offer to do equity and offer to return to the defendant the consideration which he had received for the deed which he was seeking to have cancelled.

"(3) That it appeared from said petition that plaintiff had a full, adequate and complete remedy at law, and was not entitled to the equitable relief of rescission of the contract in his petition sought to be rescinded."

It also interposed a general denial, and by special pleas averred that the contract had been substantially performed on its part, and that at the time of making said contract it was not understood by the parties that time was of the essence of the contract, but it was only contemplated that the conditions upon which the deed was executed and delivered should be performed within a reasonable time, and it was not agreed or understood by the parties that failure to comply with said conditions within the time specified in the deed would authorize its cancellation. The answer closes with the following tender of performance:

"And the defendant offers to do equity and to proceed without delay and with all possible despatch with the performance of the conditions upon which said deed was executed and delivered, which have not yet been performed."

The cause was tried without a jury, and judgment was rendered in favor of plaintiff cancelling the deed and decreeing him title and possession of the land in controversy.

The deed sought to be canceled was executed for the considerations set out in the petition, and contains the following recital:

"It is understood, however, and hereby expressly stipulated, that this conveyance is made upon the condition that the city of Houston shall keep and perform its covenants as hereinbefore set forth, in consideration of which this conveyance is made, and should the said city of Houston fail to aid and assist the county of Harris in the construction of said bridge, and if, for that reason, said bridge should not be built, finished or completed within the time hereinbefore specified, or should the said city of Houston fail to have the land hereby conveyed cleared of obstructions and utilized as a part of Gable Street for the use of the public of said city within twelve months from October 12, 1903, then this conveyance shall become null and void, and all the title and rights above conferred upon said city shall revert to me, but upon the

compliance upon the part of said city of Houston with its covenants, as hereinbefore set forth, this deed shall become and remain absolute."

There is no evidence that the appellant ever performed or attempted to perform any of the obligations imposed upon it by said deed.

The county of Harris built a bridge over Buffalo Bayou at the point designated in the deed, but this bridge was not built with the aid of appellant, and was not built within the time specified in the deed, it not having been completed until November, 1904. No part of the land conveyed by the deed has been cleared of obstructions or in any way improved or prepared by appellant for use as a street. The county of Harris has constructed a dump and trestle work approach to the bridge before mentioned over that portion of the land conveyed by said deed extending from the end of Gable Street north to the bayou. This approach is much higher than the grade line of Gable Street and necessarily prevents the use as a street of that portion of the land upon which it is placed. The evidence shows that the necessary expense of removing the obstructions from the remainder of the land and preparing it for use as a street would be considerable. The only evidence as to the ability and willingness of the city to perform its contract in this regard is the following testimony of the mayor of the city:

"In view of the expense, in addition to moving the five houses and fences, and in view of the city's financial condition, I think we could probably and would have it done during this year, probably in the fall. I say that for the reason that up to about the first of September we probably—say from about April to the 1st of September—probably we would have to borrow money because we would have none coming in, but we expect to have it about the 1st of September. We could, if it were a pressing need, borrow the money under the charter without any question at all, and we would have no difficulty in financing it. To build that six hundred feet I believe would cost a right smart sum of money and that is a thing that is problematical, in all probability it would be done during that time, but I wouldn't undertake it right away."

On redirect examination he testified:

"We plead here and offer to do equity, and as far as possible do all necessary to protect Mr. Kapner and perform this contract; if this court would enter a decree cancelling this deed upon the condition that these obstructions were not moved back and this street put in proper condition within sixty or ninety days, something of that kind, as to whether or not it is within the power of the city under a pressing necessity of that kind to move back these obstructions and fix the street as Mr. Love has indicated, from what I have heard of the evidence, that would have to be done, and I should think so."

The trial judge filed conclusions of fact and law which appear in the record, but it does not appear that any request for such conclusions was made by either party. Appellant objects to our considering these conclusions on the ground that, no request having been made for same, they can not be properly regarded as a part of the record. The statute does not require a trial judge to file his conclusions of law and fact in cases tried by him unless so requested by one of the parties to the suit, and when such conclusions are voluntarily filed by the judge neither party is required to take notice of them, and no exception to the conclusions

nor assignment predicating error on the findings of fact therein contained is required of the party against whom such finding is made to entitle him to attack the judgment on the ground that it is unsupported by the evidence. (Rev. Stats., art. 1333.) Conclusions of fact and law voluntarily filed by a trial judge can not be given the force and effect of conclusions filed under the statute above cited. The question of whether conclusions so filed can be considered by an Appellate Court as a part of the record for any purpose is not presented, and we do not feel called upon to decide.

The several assignments of error presented in appellant's brief raise but the one question of whether the evidence is sufficient to sustain the judgment of the trial court. There is no conflict in the testimony and the question is only as to the legal effect of undisputed facts.

The deed from appellee to appellant declares in plain and unequivocal language that the conveyance of the land is upon condition that appellant should perform the covenants in consideration of which the deed was executed within the time specified, and if it failed so to do no title should pass by the deed, and all the rights of appellant thereunder should revert to the grantor. None of these covenants have been performed by the appellant, and the bridge which was constructed by Harris County was not completed within the time specified in the deed.

No consideration was paid appellee for the conveyance. He had no direct interest in the bridge, and his only compensation for parting with his land was the incidental benefit which he would derive from the enhancement in the value of his adjoining property caused by the construction of the bridge and the improvement of the street. Under these facts time must be considered as of the essence of the contract, and appellant not having performed its covenants within the time specified acquired no title to the land. (Garrison v. Cooke, 6 Texas Ct. Rep., 605.)

If the failure to complete the bridge within the time specified in the contract was not in itself a sufficient ground for rescission, appellant has shown no equity which would entitle it to any further extension of time in which to perform the contract, there having been no effort on its part to perform any of its contract undertakings. It in no way procured, or aided in the construction of the bridge by Harris County, and the mere fact that a bridge has been constructed can not be regarded as a part performance of the contract by appellant and raised no equity in its favor.

We are of opinion that the judgment of the trial court should be affirmed and it has been so ordered.

Affirmed.

ALFRED WATERHOUSE ET AL. v. W. C. CORBETT ET AL.

Decided June 21, 1906.

1.—Location—Survey—Notice—Certificate.

The record, in the surveyor's office, of the field notes of a survey actually made, is authorized by law and is notice to subsequent locators. It will be ımed that the surveyor had possession of the certificate, and it is not

necessary to show, as against one claiming under a subsequent location and survey, that the certificate was left on file in his office.

2.—Cases Distinguished.

Wyllie v. Wynne, 26 Texas, 43; Lewis v. Durst, 10 Texas, 398; Woods v. Durrett, 28 Texas, 430, distinguished, and Timon v. Whitehead, 58 Texas, 295; Morris v. Brinlee, 14 Texas, 285, followed.

3.—Survey—Return of Field Notes.

The courts can not hold a location and survey invalid, as against a subsequent locator, for failure to return the field notes and certificate to the general land office in a reasonable time, where the Legislature, by relief acts, has extended the time allowed by statute for such return.

4.—Location—Survey—Notice.

A junior location and survey can not prevail over a prior one, as being by an innocent locator without notice, where it appears to have been made in recognition of such prior survey and presents merely a question of conflict by overlapping boundaries.

Error from the District Court of Harris County. Tried below before Hon. Norman G. Kittrell.

Ford, Stone & Ford, for plaintiffs in error.—The party claiming by virtue of a file made in 1840, must show that his scrip, warrant or certificate, under which the file was made, was left in the county surveyor's office in support of his file. Wyllie v. Wynne, 26 Texas, 43; Lewis v. Durst, 10 Texas, 398; Woods v. Durrett, 28 Texas, 430; Johnson v. Eldridge, 49 Texas, 521; State v. Vickery, 19 Texas, 326; Warren v. Shuman, 5 Texas, 455; Tom v. Sayers, 64 Texas, 341.

The field notes should have been returned to the Land Office within a reasonable time. Lewis v. Durst, 10 Texas, 398; Woods v. Durrett, 28 Texas, 430; McGee v. Chadoin, 30 Texas, 656.

Ross & Wood and *Hunt & Myer,* for defendants in error.—The rights of the parties to this suit are in no wise dependent upon the priority of "files."

The record of surveys of the various counties in Texas, in the office of the county surveyors, were and are public records, and all persons dealing with public lands were and are charged with notice of their contents. Act of Dec. 14, 1839; Sayles' Early Laws, art. 398, sec. 9; Act of Feb. 5, 1840; Sayles' Early Laws, art. 838, sec. 6; Wyllie v. Wynne, 26 Texas, 43; Timon v. Whitehead, 58 Texas, 295-298; Morris v. Brinlee, 14 Texas, 285-290.

The locator of the Bowman certificate would be charged with notice of location and boundaries of the William Francis survey, and he would have no right to presume that this location had been abandoned, for the record in the surveyor's office would at least put him upon inquiry. Slayton v. Singleton, 72 Texas, 213; Bryan v. Crump, 55 Texas, 15; Harrison v. Boring, 44 Texas, 263; Orme v. Roberts, 33 Texas, 772; Powell v. Haley, 28 Texas, 57.

The statutes relating to the matter in hand never prescribed that the surveys should be returned to the General Land Office within a reason-

able time, but, on the contrary, after the passage of the Act of February 5, 1840, which was the first law on the subject, various relief acts were passed extending the time for returning field notes to August 31, 1853. Pasch. Dig., art. 4542; Act Feb. 5, 1840; Sayles' Early Laws, art. 838; 1 Sayles' Real Estate Laws of Texas, art. 507; Relief Acts: Pasch. Dig., art. 4114, et seq.; Joint Resolution, Dec. 10, 1840, Sayles' Early Laws, art. 848; Joint Resolution, Nov. 27, 1841, Sayles' Early Laws, art. 1120; Joint Resolution, Dec. 27, 1842, Sayles' Early Laws, art. 1237; Joint Resolution, June 26, 1845, Sayles' Early Laws, art. 1542; Joint Resolution, Dec. 31, 1847, Sayles' Early Laws, art. 1758; Joint Resolution, Dec. 31, 1849, Sayles' Early Laws, art. 1943; Act of Sept. 6, 1850; Sayles' Early Laws, art. 2125; Act of Feb. 10, 1852; Sayles' Early Laws, art. 2253; Wyllie v. Wynne, 26 Texas, 43.

GILL, CHIEF JUSTICE.—Alfred Waterhouse brought this suit in the form of an action of trespass to try title for the recovery of the Bowman league in Harris County. He made defendants, W. C. Corbett, Julius Leider, Fred Mueller, Herman Mueller, C. Cain, August Baatz, R. S. McClaren, Alice B. and Sterling Meyer, O. C. Perrin and R. G. Tyler. Sue E. Baker was impleaded as warrantor. J. W. and E. Miller were impleaded on the cross action of Cain, Meyer, Perrin and Tyler. Leider, the Muellers, Baatz, McClaren and Corbett were eliminated from this action by disclaimer or otherwise.

The defendants Meyer pleaded not guilty as to a specific part of the land sued for and disclaimed as to the remainder. They also asked for an affirmative judgment as to the land claimed by them, both against the plaintiffs and the two Muellers. Perrin and Tyler filed similar pleas. Upon a trial to the court they had judgment and Waterhouse and J. W. and E. Miller have prosecuted this writ of error. Inasmuch as the entire judgment is not assailed it is unnecessary to set out more minutely the nature of the judgment or the intricate history of the suit in the matter of parties.

The appellees have title to the land adjudged to them if the claim under the Francis survey is superior to the Bowman, under which the claims of the other parties are predicated. The Francis certificate for two-thirds of a league was issued on the 25th day of December, 1838, and the survey thereon was made in Harris County, Texas, on April 11, 1840. The land in question is included in the boundaries of that survey. The Bowman two-thirds of a league was located in Harris County pursuant to a judgment in favor of Bowman against the Republic of Texas, of date May 23, 1842, and the survey was made August 16, 1844.

After the Francis survey was made its field notes were duly recorded in volume A, the earliest volume of the surveyor's records of Harris County. The record was made in 1840 shortly after the survey. The evidence is silent as to whether the Francis certificate was left in the office of the surveyor. The Bowman certificate and field notes were returned to the Land Office February 19, 1845, and the patent issued March 15, 1845. The certificate and field notes of the Francis were not returned to the Land Office until July 14, 1846, and the patent issued July 17, 1846.

The trial court found that the Bowman survey overlapped and con-

flicted with the Francis to the extent of the land in controversy and we approve the finding. We here adopt generally the fact findings of the trial court. They are lengthy, cover many points not necessary to the decision of the questions raised upon this appeal, and we do not consider it necessary to embody them at length in this opinion. It is enough to state that they disclose facts which show that both the Francis and Bowman certificates and surveys were regular and that the patents were properly issued. The claimants under each survey connected themselves by mesne conveyances with the original grantees.

Appellants claim the land involved in the conflict between the two surveys on the ground that Bowman was an innocent locator, their proposition being in effect that as the Francis survey was made in 1840 and the field notes not returned to the Land Office until 1846, it devolved upon the claimants under Francis to show not only that the field notes were duly recorded in the surveyor's office, but that the certificate was also left on file in that office, a fact which the evidence does not affirmatively show. In support of the proposition they cite Wyllie v. Wynne, 26 Texas, 43; Lewis v. Durst, 10 Texas, 398; Woods v. Durrett, 28 Texas, 430, and other cases to like effect.

Appellants have fallen into the error of confusing a file requesting a survey of certain lands with a survey actually made and field notes recorded by the surveyor. The record of the field notes of a survey actually made is authorized by law and is notice to subsequent locators. (Timon v. Whitehead, 58 Texas, 295; Morris v. Brinlee, 14 Texas, 285.) It was the duty of the surveyor to have possession of the certificate before the survey was made and to retain it and return it together with the field notes to the General Land Office. The evidence being silent upon the point and his acts being duly followed by the issuance of a patent by the constituted authorities, the presumption is that his action was regular.

Another proposition advanced by the appellants is that where no time is fixed by law for the return of field notes to the General Land Office they should be returned within a reasonable time, otherwise a subsequent locator who promptly complies with the law will obtain the superior right. It is contended that under this proposition the Bowman claim is superior because the six years which elapsed between the date of the Francis survey and the return of the field notes to the Land Office was an unreasonable delay.

In 1840 and prior to the making of the Francis survey an Act was passed requiring the return of field notes within one year. (Act of February 5, 1840; Sayles' Early Laws, art. 838.) This is the first law fixing a time for the return of field notes. After that date relief acts were passed: in December, 1840, Sayles' Early Laws, art. 848; November 27, 1841, Sayles' Early Laws, art. 1120; December 27, 1842, Sayles' Early Laws, art. 1237; June 21, 1845, Sayles' Early Laws, art. 1542; December 31, 1847, Sayles' Early Laws, art. 1758; and others subsequently passed extending the time for the return of field notes.

In the absence of a statute fixing the time the courts might with propriety require the field notes to be returned within a reasonable time, but in view of the relief acts cited there is no room for construction or judicial interference.

This principle was enunciated by the court in Wyllie v. Wynne, *supra,* in discussing and overruling Williams v. Craig, 10 Texas, 437. McGee v. Chadoin, 30 Texas, 650, recognizes the force of the acts extending the time of returning field notes to the Land Office. In Wyllie's case, supra, the distinction is also observed between a mere filing of the certificate with the surveyor with request to make a survey and a survey actually made and field notes recorded. The case of Lewis v. Durst is also distinguished from such as the one under consideration. It was also held that the certificate and field notes were constructive notice to subsequent locators that the land had been appropriated.

But there is another and broader reason in this case why Bowman can not prevail as an innocent locator. It affirmatively appears that the Francis location was not abandoned and it does not appear that Bowman acted upon that theory. On the other hand the two surveys merely conflict as to boundaries, and the junior survey seems to have been made in recognition of the senior. All the early maps and plats of the Land Office regarding these surveys disclose the existence of each and show no conflict. Actual knowledge on the part of a subsequent locator of the previous location by another precludes him from deriving any advantage from the fact that the surveyor's office contained no evidence thereof at the date of the subsequent location. (Morris v. Byers, 14 Texas, 277.)

We do not deem it necessary to discuss the remaining assignments in detail. They are in our opinion without merit.

The judgment of the trial court is affirmed.

Affirmed.

Application for writ of error dismissed for want of jurisdiction.

WALTER P. BREATH ET AL. v. LOTTIE FLOWERS ET AL.

Decided June 23, 1906.

Suit Involving Homestead—Wife a Necessary Party, When.

Unless it appears in a suit for land occupied as a homestead, that the homestead character of the property would have afforded a defense to the suit, it is not necessary that the wife should be made a party in order that her right and title be divested by the judgment.

Appeal from the District Court of Hardin County. Tried below before Hon. L. B. Hightower.

Lanier & Martin, Taliaferro, Nall & Dies and *Clay S. Briggs,* for appellants.—A judgment against the husband alone, touching community property, is conclusive as to the title to the property upon both husband and wife. Nor is the wife a necessary party to any suit in which the homestead is not available as a defense, merely on account of the fact that the family home is established on the property, unless she has a defense growing out of her homestead rights, which would defeat the action, in which event she is a necessary party.

Under the court's findings of fact, the appellants' right of action as owners of the title to the land existed in them and in those from whom

they deraign title when the appellees first entered upon this land as trespassers; such being the case, their title was not subject or subservient to appellees' homestead rights. Appellees' limitation title was as available to the appellee E. B. Flowers in the former suits against him as it would have been had his wife been joined as a defendant in said suits.

Their homestead rights would not have been a defense to such suits, and could not have defeated plaintiffs' action. Jergens v. Schiele, 61 Texas, 256; City of San Antonio v. Berry, 92 Texas, 327; Central Coal & Coke Co. v. Henry, 47 S. W. Rep., 281; Collins v. Ferguson, 22 Texas Civ. App., 554.

In the absence of pleading and proof of fraud and collusion a title to land belonging to the community estate, occupied as a homestead, can be attacked and divested by a suit against the husband without making the wife a party to the suit, where the question of homestead is not involved or available as a defense.

No briefs for appellees.

REESE, ASSOCIATE JUSTICE.—Lottie Flowers and her husband, E. B. Flowers, brought this suit in trespass to try title against Walter P. Breath and others to enjoin the execution of a writ of possession issued upon a judgment of the District Court of Hardin County in cause No. 974, wherein the defendants, W. P. Breath and others, were plaintiffs and E. B. Flowers and others were defendants, and also for the title and possession of 160 acres of land out of the James Scott league. Defendants in the suit, among other defenses, pleaded that the matters and things involved were *res judicata*. The case was tried without a jury, and judgment rendered for plaintiffs Lottie Flowers and E. B. Flowers, and defendants appeal.

The trial court filed conclusions of fact and law. The finding of fact are not assailed by the assignments of error and are as follows, omitting immaterial matters:

"That the paper and record title to the James Scott league of land in Hardin County, Texas, is in the defendants, Walter P. Breath, Carrie Louise Breath Mel, wife of Jon Mel, and John H. Kirby, defendants herein, and was in them and those from whom they deraign title at the time plaintiffs went into possession.

"That on the — day of ———, 1900, Walter P. Breath and W. F. Breath, in his capacity as guardian of the estate of Carrie Louise Breath, a minor, instituted a suit of trespass to try title in the District Court of Hardin County, Texas, No. 725, styled Walter P. Breath et al. v. Carl Anderson et al., and in said cause, on the 3d day of April 1901, obtained a judgment against all the defendants therein, viz.: Carl Anderson, Ashton R. Spence, I. Lovenberg, M. Ucanich, Frank Daffarari, J. E. Votaw and Ervin Flowers (one of the plaintiffs herein), for the whole of the said James Scott league of land, the judgment against E. B. Flowers being a judgment by default; no appeal was taken from said judgment.

"That on the 11th day of July, 1903, defendants herein filed another suit of trespass to try title, styled Walter P. Breath et al. v. E. B.

Flowers et al., involving the whole of said Scott league, No. 974, in District Court of Hardin County, Texas, and on the 3d day of September, 1903, judgment by default was taken against a number of the defendants and against others on their disclaimers, and the case was continued as to the defendants E. B. Flowers and Isaac Flowers, and some of the other defendants named therein.

"That at the April term of said court E. B. Flowers filed his answer in said cause, and by cross-bill set up his plea of ten years' limitation, to which plaintiffs in that suit excepted, pleading in bar of said cross-action the judgment rendered in cause No. 725 on the 3d day of April, 1901, which exception was by the court sustained, and, on the 4th day of October, 1904, judgment was rendered against all the defendants to that suit, including the said E. B. Flowers, for the whole of said James Scott league, and no appeal was taken from said judgment by any of the defendants.

"On the — day of March, 1905, a writ of possession was issued under the last named judgment against the said E. B. Flowers, and placed in the hands of L. G. Roberts as sheriff of Hardin County, for execution. An injunction was granted on the 20th day of March, 1905, by the Honorable L. B. Hightower, judge of the Sixtieth Judicial District of Texas, on the petition of plaintiffs Lottie Flowers and her husband E. B. Flowers, restraining the said sheriff from executing said writ of possession, and against the other defendants, restraining them from in any way attempting to enforce either of said judgments.

"That no writ of possession ever issued under the judgment in cause No. 725. That the only writ of possession issued under the judgment in cause No. 974 is the one, the execution of which was enjoined as above stated.

"That the said Lottie Flowers and her husband, E. B. Flowers, had resided on said James Scott league of land for more than twenty years prior to the institution of said first suit, No. 725 (in which said suit judgment by default was rendered against the said E. B. Flowers on the 3d day of April, 1901) claiming 160 acres of the same, making valuable improvements thereon, occupying, cultivating, using and enjoying the same adverse to the defendant and all others. That during the whole of said period said premises were occupied and claimed by the said Flowers and wife as their homestead and they do so now occupy the same, and that they had no other home.

"That said Lottie Flowers and E. B. Flowers were married at the time they so entered upon said land, and have continuously resided together on the premises so entered from the date of such entry to the present.

"That the said Lottie Flowers was not a party to either of said suits, or to the said writ of possession under said last named judgment."

From these findings of fact the court concluded, as matter of law, that appellees had established title by limitation to the land sued for, and found further that, "The title having been perfected and the land occupied and used in the manner required by law to constitute it the homestead of plaintiffs, and the investiture of the homestead rights being complete in the wife before the institution of the suit, she was a necessary party. The judgments in these two cases, Nos. 725 and 974,

being against the husband alone, are inoperative, and did not divest the title to such homestead, and the wife can not be disturbed in her possession of the homestead by writs of possession issued under such judgments." No fraud or collusion between E. B. Flowers and appellants was either alleged or proven in the rendition of either of the two judgments referred to in the court's findings, nor is it alleged or proven that there was any defense which could have been made to the suits in which the judgments were rendered, growing out of the homestead character of the property. The court finds in this suit that appellees had title by limitation at the time of the institution of the suits against E. B. Flowers, and it results from such findings that if such defense had been properly urged it would have defeated the suits.

Clearly, the fact that the land in controversy was the community homestead of appellees would have been no defense to the suit in which the judgments were rendered. From the fact that it was community property there resulted no necessity to make the wife a party to the suit in order to render the judgment therein binding upon her, and an effectual bar to her rights. Her rights in the land arising from the fact that it was the homestead of herself and husband are altogether different, and if it appeared that, growing out of the fact that the property was the homestead, any defense could have been made to the suits, and the wife was not a party, then neither as against her husband nor herself would the judgment operate to divest the title to the land, and this would be true even if such defense had been actually made by the husband and overruled. Unless it appears, however, in a case like the present, that the homestead character of the property would have afforded a defense to the suit, it is not necessary that the wife should have been made a party in order that her right and title should be divested by the judgment. That this has the effect of divesting the title of the wife to her homestead without her consent and possibly without her knowledge is true, but the question must be regarded as so far settled in this State as to be binding upon this court. (Jergens v. Schiele, 61 Texas, 256; San Antonio v. Berry, 92 Texas, 327; Central Coal & Coke Co. v. Henry, 47 S. W. Rep., 281; Collins v. Ferguson, 22 Texas Civ. App., 554; Brown v. Humphrey, 15 Texas Ct. Rep., 742.)

The case appears to have been fully developed upon the trial. Upon the undisputed facts judgment should have been rendered for appellants. The judgment of the trial court is therefore reversed and judgment here rendered for appellants.

Reversed and rendered.

J. W. LINK v. RICHARD BLAND.

Decided June 23, 1906.

1.—Limitation—Ten Years—Naked Possessor.

One who takes and holds possession of land without any right or title thereto, and with the intention and for the purpose of acquiring title by limitation, is within the protection of the ten years' statute of limitation.

2.—Verdict—Sufficient.

In trespass to try title the following verdict was rendered: "We the jury find a verdict for defendant, Richard Bland, allowing him to retain the 160

acres of land with all improvements thereon." Held, in view of the pleadings and charge of the court, sufficient to authorize a judgment for the 160 acres claimed by defendant and described in his answer.

Appeal from the District Court of Orange County. Tried below before Hon. W. P. Nicks.

Holland & Holland, for appellant.—The verdict and judgment are contrary to the law and evidence in that the undisputed evidence showed that defendant's possession of the premises in controversy was not commenced or continued under a claim of right, as required by law, and the court erred in overruling plaintiff's motions for new trial on said ground. Sayles' Civil Statutes, 1897, art. 3349; Bracken v. Jones, 63 Texas, 186; Burton v. Carroll, 72 S. W. Rep., 582; Chance v. Branch, 58 Texas, 492; Mhoon v. Cain, 77 Texas, 318; Satterwhite v. Rosser, 61 Texas, 170; 1 Am. & Eng. Ency. of Law, 790; Texas W. Ry. Co. v. Wilson, 83 Texas, 155; Hays v. Texas & Pac. Ry., 62 Texas, 397; Whitaker et al. v. Thayer et al., 86 S. W. Rep., 364; Lochausen v. Laughter, 4 Texas Civ. App., 293; Wells Admx. v. Fairbank, 5 Texas, 582.

Hart & Sholars, for appellee.—Peaceable and adverse possession of a tract of land, by actual possession, using, cultivating or enjoying the same for a period of ten years gives the party so using, cultivating or enjoying the same, title to 160 acres of land by prescription as against the owner of the land. Sayles' Annotated Stats., art. 3343; Magerstadt v. Lampert et al., 87 S. W. Rep., 1068; Travis v. Hall et al., 83 S. W. Rep., 425; East Texas Land and Improvement Co. v. Shelby et al., 41 S. W. Rep., 542; Cartwright v. Pipes et al., 29 S. W. Rep., 690; Parker v. Covey et al., 28 S. W. Rep., 64; Murphy v. Reynaud, 21 S. W. Rep., 991; Robinson v. Bazoon et al., 15 S. W. Rep., 585; Mims v. Rafel, 11 S. W. Rep., 277; Craig v. Cartwright, 65 Texas, 422; Andrews v. Parker, 48 Texas, 97; Ward v. Drouthett, 44 Texas, 369; Horton v. Crawford, 10 Texas, 389; McDonald v. McGuire, 8 Texas, 371.

The verdict of the jury must be responsive to the material issues, and sufficiently certain in its response to the facts, to show the intention of the jury and may be aided by reference to the pleading, and if it is sufficiently certain to be made certain by reference to the record of the case, it is good. Merrielles v. State Bank, 24 S. W. Rep., 564; Martin-Brown Co. v. Perrill, 13 S. W. Rep., 978 (last of case); Harkey v. Cain, 6 S. W. Rep., 637; Munn v. Martin, 4 Texas App. Civ. Cases, sec. 61; Holden v. Meyer & Buette, 1 Texas App. Civ. Cases, sec. 832; Griffin v. Chadwick, 44 Texas, 407; Newsomb v. Walton, 41 Texas, 318 and cases therein cited; Ellis v. Ponton, 32 Texas, 439; O'Brian v. Hilburn, 22 Texas, 625.

The judgment of the court should conform to the pleadings, the nature of the case proved and the verdict, and should be so framed as to give the party all the relief to which he may be entitled, either in law or equity. Sayles' Annotated Stats., art. 1335; Crawford et al. v. Stevens, 31 S. W. Rep., 79; Weaver v. Vandervanter, 19 S. W. Rep., 889; Cooper v. Conerty et al., 18 S. W. Rep., 334 and authorities therein cited; Hardy v. DeLeon, 5 Texas, 246.

REESE, ASSOCIATE JUSTICE.—This is a suit by J. W. Link against Richard Bland in trespass to try title for 640 acres of land described as survey No. 19, T. & N. O. Ry. Co., in Orange County.

Defendant, among other defenses, pleaded the statute of limitation of ten years as to 160 acres of the land sued for, including his residence and improvements, which 160 acres are specifically described in his answer, and disclaimer as to the remainder of the survey.

There was a verdict for defendant as to the 160 acres, and judgment for him therefor, and for plaintiff for the remainder upon defendant's disclaimer. From the judgment plaintiff appeals.

By his first assignment of error appellant assails the verdict and judgment on the ground that the undisputed evidence showed that defendant's possession was not commenced or continued under a claim by right, as required by the statute.

From the evidence in the record as to appellee's possession we deduce the following facts:

The suit was begun September 8, 1904. In February, 1894, appellee, who was a married man, moved upon the section of land in controversy with his wife. He built a dwelling house with other usual improvements of a home, on the southeast quarter of the section, before moving on it, cleared land, put about four acres in cultivation the first year, which was afterwards increased to ten acres in cultivation and fifteen acres in pasture. He has continuously lived with his family on the land since first moving there in February, 1894, and has always claimed the land adversely to the owner, and all other persons. When he first began to clear the land for his home, he thought the land was on section 22; a school section; but found out before his house was built and before he took up his residence that it was on section 19, and that the section belonged to the T. & N. O. Ry. Company.

Appellee's intention was to hold the land in hostility to the owner and every one else, but he testified that he had no title to the land, that he had never bought it, nor inherited it, nor had anybody ever given it to him. Knowing he had no title he took possession claiming, and intending to claim, the land by virtue of his possession and continued to occupy it as his home under such claim based upon his possession alone, from and after February, 1894. His possession was during all this time open and notorious and was exclusive and hostile to the owner and all others. Appellee testified that he knew that the land was not his and that he did not claim to own it when he first went on it, that he never asserted a better title than the T. & N. O. Ry. Company, but his testimony shows clearly that what he meant by these expressions was that he had no title to the land, and never claimed to have any except what his naked possession gave him, and never asserted any hostile claim except such as could be predicated upon his possession. The undisputed evidence shows clearly that appellee's possession was an actual and visible appropriation of the land, adverse to all the world and that he at all times claimed whatever right such possession gave him, without at any time claiming to be the owner of the land in the sense of having title or right except such as inhered in, and was attached to, such possession.

Appellant's contention as to the law upon this state of facts can best be stated by the following quotations from his brief:

"The language of the statute applying to the contention of appellant in this case is plain. 'Adverse possession is an actual and visible appropriation of the land, commenced and continued under a claim of right, inconsistent with, and hostile to the claim of another.' Under this statute a man to start the statute of limitations running must be an honest claimant of the land he is in possession of. The statute was made to protect persons honestly claiming their property and in the possession thereof. The statute was not made, nor intended to deprive the owner of land, of his title thereto, at the claim of a possessor thereof in bad faith, who was occupying the land without a claim of right, in other words knowingly; without title and without the right of possession. There is no law in Texas that protects a naked squatter on the lands of another. His term of occupancy as a naked squatter, and knowing that he had no right to enter or hold the land, and not claiming to have any such right, would never ripen into title, and possession of this kind was never intended to ripen into title or deprive the owner of any rights of property."

Appellant lays much stress upon the provisions of article 3349, Revised Statutes, defining adverse possession to be "actual and visible appropriation of the land commenced and continued under a claim of right, inconsistent with, and hostile to the claim of another," and it is strenuously insisted that the undisputed evidence shows that appellee did not enter into possession under such "claim of right" as is here intended.

It can not be denied that he claimed whatever right his possession entitled him to, but it is insisted that the entry and possession must be upon at least a claim, of ownership and right of possession, independently of the possession itself. We think this is a fair statement of appellant's contention.

The law has clearly been settled otherwise by an unbroken line of decisions in this State. It was held by the Supreme Court in Charle v. Saffold (13 Texas, 112), "It thus appears that naked possession will secure title for six hundred and forty acres without enclosure, or one thousand or two thousand with enclosure; and the circumstances under which the possession is taken are altogether immaterial to the right, provided the occupant claims for himself and adversely to others. No matter how tortious or wrongful may be the seizure, if possession be continued for the time limited by statute, it will give title preclusive of all claims; . . . no question is made or is open relative to the *bona fides* or *mala fides* of the possession." This doctrine had been followed in numerous cases of which we need only cite the following: Craig v. Cartwright, 65 Texas, 421; Ward v. Drouthett, 44 Texas, 369; Bruce v. Washington, 80 Texas, 372; Cox v. Sherman Hotel Co., 47 S. W. Rep., 809.

It is true that the statute defining adverse possession was not passed until the adoption of the Revised Code of 1879 (article 3198, Revised Statutes, 1879) and that of the cases cited, Charle v. Saffold and Ward v. Drouthett, were decided prior to that date, but the statute referred to only incorporates, as a part of the law, the very construction placed upon the former law as to what was necessary to constitute adverse posses-

sion, as laid down in Portis v. Hill, 3 Texas, 279; Craig v. Cartwright, *supra.*

There is no intimation in the evidence that appellee held in subordination to the title of appellant or anyone else. He says that he intended to hold the land until he was put off, by which is evidently meant until he was divested of possession by someone whose title was superior to whatever rights his possession gave him. Appellee was a naked possessor, but such persons are clearly within the protection of the statute, even where they take and hold possession with the intention of acquiring title by limitation to something to which they have no claim otherwise. None of the cases cited by appellant in his brief support his contention. It will be found that all of them turn upon the point that the possession has been in subordination to the title of the owner, or under circumstances which show that it was not intended to be adverse to the owner or did not show a visible appropriation of the land.

Appellee's possession gave him title to 160 acres of the land. It appears that he had had the particular 160 acres claimed by him, and which included his improvements, surveyed in 1903.

The assignments of error presenting the proposition discussed is overruled.

It is objected to the verdict that it does not settle the issue submitted, and that the judgment is not responsive thereto. The verdict is as follows: "We, the jury, find a verdict for defendant, Richard Bland, allowing him to retain the 160 acres of land with all improvements thereon."

In view of the pleadings and the charge of the court this verdict was entirely sufficient to authorize a judgment for the specific 160 acres claimed by appellee and described in his answer.

We find no error in the record and the judgment is affirmed.

Affirmed.

Choctaw, Oklahoma and Texas Railway Company v. Grant McLaughlin.

Decided June 23, 1906.

1.—Backing Train—Signals—Negligence—Question of Fact.

Plaintiff alleged two grounds of negligence causing his injury, viz.: Failure of the locomotive engineer to give the usual backing signal, and failure to keep a brakeman near the rear end of the train to warn plaintiff of its backward movement. The court in its charge submitted both grounds. Held, proper, because although a code of signals as to the movement of the train, including a signal for backing, had been established, it was a question for the jury and not the court to determine under the circumstances whether a person of ordinary prudence would have considered a code of signals adequate protection to the employes.

2.—Allegation and Proof—Charge Construed.

Where there was nothing in the evidence to suggest any other ground of recovery other than those alleged it was not reversible error for the court in its charge to authorize a recovery in general terms if the jury should believe from the evidence that the person in charge of the train in question was guilty of negligence, especially when this was followed by a distinct, disjunctive statement of the two grounds of recovery alleged.

3.—Charge—"Approximately" Instead of Proximately.

The use of the word "approximately" for proximately in one place in the charge was harmless when everywhere else in the charge proximate and not approximate was used in referring to the cause of the injury.

4.—Railroad Company—Construction Company—Subcontractor—Liability.

Evidence considered, and held to warrant a verdict against a railroad company for personal injuries where the railroad company had let the contract for the construction of the road to a construction company, and the construction company had sublet the contract for laying the rails to a third party by whom plaintiff was employed when injured.

Appeal from the District Court of Potter County. Tried below before Hon. Ira Webster.

N. H. Lassiter, Robert Harrison and *Madden & Trulove,* for appellant.—The charge was error in that it directed the jury to return a verdict for the plaintiff, if they believed that the railway company, or its agents, servants and employes failed to provide a watchman at the rear of the train to warn persons working behind it, or if the engineer failed to give certain signals, as provided in a code of signals, and either of these failures constituted negligence on the part of the defendant, which was the proximate cause of the injury. Quinn v. Galveston, H. & S. A. Ry. Co., 84 S. W. Rep., 396.

The charge was error, because it directed the jury to find a verdict for the plaintiff, if the defendant negligently caused the injury, unless they should find that the plaintiff was himself guilty of negligence "approximately" contributing to his injury. Pecos & Northern Texas Ry. Co. et al. v. Lovelady et al., 80 S. W. Rep., 867.

The charge was error in that it instructed the jury that if they believed from the evidence that the person or persons in charge of the engine and construction train at the time of the injury, was guilty of negligence in operating the train as it was, and in the manner it was handled, at the time of the injury, to find for the plaintiff, regardless of whether or not this negligence was the proximate cause of the accident. Missouri, K. & T. Ry. v. Eyer, 70 S. W. Rep., 529; Missouri, K. & T. Ry. v. Cardena, 55 S. W. Rep., 44; Texas & Pac. Ry. v. Scrivener, 49 S. W. Rep., 649.

The definition of proximate cause, as given herein, was incorrect, and calculated to confuse and misinform the jury, and to cause them to conclude that the plaintiff was not guilty of negligence proximately contributing to his injury, when in fact he was. The charge is as follows:

"By the expression 'proximate cause' is meant such cause as could have been reasonably expected to produce the result or injury complained of, and such as would reasonably be expected to have been anticipated by the party committing the alleged wrongful act at the time of its commission."

The evidence is undisputed that the construction train was not under the control and direction of the defendant at the time of the accident, and is undisputed that the company employing the persons operating the construction train at the time of the accident was not the agent of, or under the control of, or identical with, the defendant company. Pullmain Co. v. Missouri Pac. Co., 115 U. S., 587; Sabine Tram Co. v.

Bancroft, 40 S. W. Rep., 837; St. Louis S. W. Ry. Co. v. Gate City Co., 65 S. W. Rep., 706; Gulf, C. & S. F. Ry. Co. v. Lee, 65 S. W. Rep., 54.

John W. Veale, Hendricks & Ewing and *Theodore Mack,* for appellee.

STEPHENS, Associate Justice.—The judgment appealed from, in the sum of eight thousand dollars, was recovered by appellee against appellant as compensation for personal injuries.

Appellant, a Texas corporation, chartered to construct a railroad between Amarillo, Texas, and New Mexico, undertook to have this railroad constructed and equipped by the Gulf Construction Company, an Illinois corporation, agreeing, in consideration of the construction company's performance of its undertaking to build and equip the road, to transfer to it all the stock and bonds which the Railroad Commission of Texas would authorize to be issued by the railroad company for said construction and equipment. One J. H. Roberts made a contract with the construction company to lay the track, the latter agreeing to furnish him a supply, or construction train and a crew to operate it. Appellee was employed by Roberts to assist in laying the track, and, according to his testimony and that of some other witnesses, it was his duty to follow immediately behind the construction train and bolt the rails. While in the discharge of this duty he was severely injured, the train crew backing the train on him without sufficient warning and crushing his left arm. The evidence warranted a finding that the accident was due to the negligence of the locomotive engineer in failing to sound his whistle before backing the train and that appellee was not guilty of contributry negligence.

Two grounds of negligence were alleged: First, failure of the locomotive engineer to warn appellee of the backing of the train by sounding the whistle of his locomotive; second, the failure to keep a brakeman stationed near the rear end of the train to warn appellee of its backward movement.

In submitting these issues the court gave the following charge, to which error is assigned: "If you believe from the evidence that the injury to plaintiff occurred as alleged in his petition, and if you further believe from the evidence that the person or persons in charge of said engine and construction train at the time of such injury was guilty of negligence in operating said engine or train made up as it was and in the manner you believe the same was handled at the time of the injury, or that the defendant, its agents, servants and employes did not provide a watchman in the rear of said train to warn the persons working behind said train of the contemplated movements of the same, or if you believe that a code of signals had been established whereby it became the duty of the engineer of the dummy engine to give three blasts of the whistle of his engine, and that it was the duty of the locomotive engineer to repeat the same signal by three blasts of the whistle of his engine for the purpose of warning those working in the rear of said train as to the contemplated movement of said train; and if you further believe that the engineer of the locomotive engine failed to repeat such warning by three blasts of the whistle of his engine just before the backward movement of said train at the time of the injury;

and if you further believe that such failure, if any, to provide a watchman in the rear of said train to notify those working in the rear thereof of the contemplated backward movement of the train, or if you believe that said failure, if any, to warn said workmen working behind said train by blasts of the locomotive engine, constituted negligence upon the part of the defendant or its agents, servants and employes, and if you believe that said negligence, if any, was the proximate cause of said injury to said plaintiff Grant McLaughlin, then you will return a verdict in favor of the plaintiff Grant McLaughlin, unless under the instructions hereinafter given, you find, that the said Grant McLaughlin was himself guilty of negligence approximately contributing to his injury."

The main objection to this charge seems to be that inasmuch as a code of signals had been established to advise the men engaged in laying the track of the movements of the construction train, which, if observed, would have afforded ample protection to the appellee, it was not incumbent on those undertaking to operate it to take the further precaution of stationing a brakeman near the rear of the train for the same purpose. We are, however, of opinion that it was for the jury, and not the court, to determine whether a person of ordinary prudence would have considered a code of signals adequate protection to an employe occupying the dangerous position in which appellee was placed, or whether such person would have taken the further precaution of stationing a brakeman near the rear end of the train as an additional protection to appellee and those working with him. The case of Quinn v. Galveston, H. & S. A. Ry. Co., 84 S. W. Rep., 396, is cited by appellant as one "directly in point," but there is nothing in the disposition of that appeal, in which the judgment was reversed, in conflict with the conclusion we have reached, although so much of the opinion as approved the action of the court in ignoring one or two of the issues in the case may seem to be so. The circumstances in which appellee was placed seem to have called for more than ordinary precautions for his safety, his position while bolting the rails being within two or three feet of the rear end of the construction train and the noise attending the work in which he and others were engaged being such as to render it difficult to distinctly and readily hear and recognize even the whistle of an engine when at any considerable distance from him. We note, also, that two similar grounds of recovery were submitted, seemingly with approval, in the case cited and so much relied on.

The following clause of the charge is also objected to: "And if you further believe from the evidence that the person or persons in charge of said engine and construction train at the time of such injury was guilty of negligence in operating said engine or train made up as it was and in the manner you believe the same was handled at the time of the injury." It must be conceded that the charge would have been in better form if this clause had been omitted, but as only two grounds of recovery were alleged and as there was nothing in the evidence to suggest any other ground of recovery, and as this clause, containing only a general statement, was followed by a distinct, disjunctive statement of these two grounds of recovery, we have concluded that it would be unreasonable to suppose that the jury were in any way misled by the

clause objected to. It was a mere introductory statement, and the word "or" following it must have been used in the sense of "that is."

The use of the word "approximately" for proximately in the last clause of the charge above quoted is criticized and the definition of proximate cause elsewhere found in the charge is also criticised, but this definition we approve as being substantially correct, and inasmuch as several times and everywhere else in the charge proximate instead of approximate was used, we think this mere *lapsus calami* could not have done any harm.

The most important and at the same time most troublesome issue in the case is raised by the assignment complaining of the following charge: "Third, before you can find for the plaintiff under the above paragraph of this charge, you must find either that the construction train behind which plaintiff was working was under the control and direction of defendant through its agents, or servants, employed by the defendant company and under the control of said defendant company, or that the person or company in whose employ they were, was the agent of, or under the control of, or identical with, the defendant company in point of fact. Should you find that the person or persons in charge of said construction train were the employes of a separate and distinct corporation or person not identical with, agents of, nor under the control of defendant, the Choctaw, Oklahoma & Texas Railroad Company, but was an entirely separate and independent corporation or person acting for itself independently, then your verdict will be for the defendant."

The following is the proposition, and the only proposition, submitted under the assignment complaining of this charge: "The evidence is undisputed that the construction train was not under the control and direction of the defendant at the time of the accident, and is undisputed that the company employing the persons operating the construction train at the time of the accident was not the agent of, or under the control of, or identical with, the defendant company."

The written contract between the construction company and the railroad company, after reciting that the railroad company "had secured from the State of Texas a charter empowering it to build a new line of railway" between Amarillo and New Mexico, and that the construction company was desirous of performing all the work and furnishing all the material for the construction of this line, obligated the construction company, "under the direction and subject to the approval of the chief engineer of the railway company," to locate the railway, provide the right of way, construct the railroad, including section houses, stations, machine shops, *et cetera,* and equip the same with rolling stock and motive power, all at its own expense; and obligated the railway company to allow the use of its name in securing the right of way and to issue and deliver to the construction company, in consideration of the full performance of its covenants, all the first mortgage bonds and certificates of stock the railway company would be authorized by the Railroad Commission of Texas to issue, and to assign and deliver to the construction company all subsidies received for the construction of the railroad. The construction train used in laying the track, the backing of which, without giving the requisite signal, caused the injury,

was the property of the Choctaw, Oklahoma & Gulf Railway Company, but seems to have been furnished by appellant through its superintendent, and while the wages of the crew furnished with this train to operate it seem to have been paid by the construction company, there was evidence tending to prove that these trainmen received orders from, and had been employed, and were dischargeable, by the superintendent of appellant, the Choctaw, Oklahoma & Texas Railway Company, which the circumstances indicated belonged to the family of railroad companies designated as the "Rock Island System," although this was denied by the president of the construction company, who was also vice-president of the Chicago, Rock Island & Pacific Railroad Company, the parent company of this family or system. It is claimed, however, and there was testimony to that effect, that the construction company had leased or rented the work train from the railroad company, but no attempt was made to show exactly how this was or what authority the railroad company had to make such a lease to a foreign corporation having no franchise to operate railroad trains in Texas. The evidence also tended to show that the chief engineer of appellant, who was also engineer for the construction company, ordered the construction train into service when requested by Roberts, the subcontractor, but the manner of moving it was committed entirely to the care of the train operatives, who do not seem to have been in any way responsible for their conduct either to the construction company or to its subcontractor, although they probably would have been discharged by the railroad company if justly complained of by the construction company or Roberts. We can not, therefore, quite agree with appellant that "the evidence is undisputed that the construction train was not under the control and direction of the defendant at the time of the accident." While it was the duty of the train crew to move the train back and forth at the instance of the construction company, or rather of its subcontractor, as occasion required in laying the track, and in this general sense the work train was under the control of the contractor, yet the actual and immediate control of its movements was at all times in the hands of the train operatives, who were the servants of appellant, as above seen. It was from the manner in which these servants exercised this power and discharged their duty to their employer, the railway company, that injury resulted to appellee, and not from any act of the construction company or its subcontractor, who had only the right to call for the movement of the train and had to depend entirely on the train operatives to properly handle it. See Burton v. Galveston, H. & S. A. Ry. Co., 61 Texas, 527, where this question is ably discussed by Mr. Justice Stayton. See, also, St. Louis S. W. Ry. v. Arnold, 74 S. W. Rep., 819, and other cases there cited.

Nor can we agree with appellant that "it is undisputed that the company employing the persons operating the construction train at the time of the accident was not the agent of, or under the control of, or identical with the defendant company." While the construction company and the railroad company or companies were theoretically distinct, the circumstances at least tended to show that they were practically one—that the construction company was but another name for

the railroad company. In view, however, of the next preceding conclusion, this need not be discussed.

As to the liability of a railway company for injuries occurring on its track through negligence of those operating trains thereon, even where such trains belong to a foreign company and are operated by its employes, see Gulf, C. & S. F. Ry. Co. v. Miller, 9 Texas Ct. Rep., 757, 11 Texas Ct. Rep., 330. But see Cunningham v. International & G. N. R. R., 51 Texas, 503.

The remaining assignments complain of the refusal of special charges, of the admission of testimony, and of the overruling of the motion for a new trial, but while all of these rulings have been carefully examined, we find no material error in any of them.

The judgment is therefore affirmed.

Affirmed.

Writ of error refused.

TOM HOLLEY v. C. W. DUKE.

Decided June 23, 1906.

Disposition of Parties Necessary to Final Judgment.

Where the sureties on an attachment bond were parties defendant to a suit, but the judgment makes no disposition of them the judgment is not final and an appeal therefrom will be dismissed.

Appeal from the County Court of Terry County. Tried below before Hon. W. N. Copeland.

W. R. Spence, for appellant.

W. T. McPherson, for appellee.

SPEER, ASSOCIATE JUSTICE.—We have no jurisdiction to determine the merits of the controversy presented on this appeal, since there was no final judgment rendered in the cause in the County Court. The suit was instituted by appellee against appellant on a stated account, and contemporaneous with the institution of the suit an attachment was sued out and levied upon property alleged to belong to appellant. Appellant reconvened for damages not only against appellee but also asked to have the sureties on appellee's attachment bond cited, and prayed for judgment against them also on such bond. The sureties answered, but the judgment nowhere disposes of these parties. Until the judgment does dispose of all the issues and all the parties, it is not such final judgment as will support an appeal to this court. (Stewart v. Lenoir, 72 S. W. Rep., 619; Riddle v. Bearden, 10 Texas Ct. Rep., 346, and authorities cited in these cases.) Appeal dismissed.

Dismissed.

W. F. STEWART ET AL. v. JACOB SACHS & CO.

Decided June 23, 1906.

1.—Contract on Sunday—Market Value of Goods—Charge.

The suit being upon an account for goods sold and delivered at a stipulated price and the defenses being that the goods were of an inferior grade, and the contract for their purchase was made on Sunday, the court did not err in charging the jury to find for the plaintiff the market value of the goods in question, although the suit was for an agreed price, because the petition alleged that the market value and the agreed price were identical, and the defensive pleading and evidence raised the issue of market value. The defendant was liable for the market value of the goods irrespective of the validity of the contract.

2.—Charge—Assumption of Fact—Harmless.

A charge which assumes the fact that the goods sued for had a market value is harmless when it is certain that said goods had at least some value in the market.

Error from the District Court of Tarrant County. Tried below before Hon. Irby Dunklin.

W. A. Hanger, for plaintiff in error.

W. B. Paddock. for defendant in error.

CONNER, CHIEF JUSTICE.—This is an appeal from a judgment in favor of defendants in error upon an account for certain whiskeys, wines, cigars, etc., sold to the firm of A. B. Castleman & Company, showing a balance of seven hundred and sixty-eight dollars due thereon. The only defenses, necessary to notice, were that the order or contract for the goods was made on Sunday, and that the articles furnished were inferior, adulterated, etc.

It is urged that the court erred in his charge insofar as the jury were thereby authorized to find for plaintiffs below the market value of the merchandise in question, on the ground that the suit was upon an express contract for a stipulated price. While it is true that the petition alleged that defendants agreed to pay the prices stated in the itemized account sued upon, it was also alleged in substance that said prices were identical with the reasonable market value of the articles specified. Besides, the issue of reasonable or market value was raised by the evidence and defensive pleading. It is undisputed that said firm actually received and appropriated the merchandise shipped in answer to the order made. This being true, plaintiffs in error were liable for the reasonable market value thereof, irrespective of the asserted invalidity of the order and regardless of the fact that the goods may have been of inferior grade. Indeed, it was only in submitting the defenses named that the charge was given, the jury being otherwise charged peremptorily to find for plaintiffs below the amount shown to be due by the account, unless they should find for defendants under said defensive issues.

The foregoing conclusions, we think, sufficiently dispose of the remaining assignments, unless, perhaps, we should notice the objection

that the charge is upon the weight of the evidence, in that it assumes that the property mentioned "had a market value." But if it be conceded that the charge is subject to this criticism, there can be nothing in it, inasmuch as it seems certain that the property had at least some value in the market.

Finding no error in the proceedings of which plaintiffs in error can complain, and that the pleadings and evidence support the judgment, it will be affirmed.

Affirmed.

TEXAS AND PACIFIC RAILWAY COMPANY v. W. T. BRANNON, NEXT FRIEND.

Decided June 23, 1906.

1.—Discovered Peril—Conflicting Evidence—Verdict.

Where the vital issue in a case is discovered peril, and the testimony is conflicting, that for the plaintiff being sufficient to support the verdict, the court did not err in refusing to instruct a verdict for the defendant, nor in refusing to set the verdict aside.

2.—Same—Charge.

Charge on discovered peril considered, and held a fair presentation of the law on that subject.

3.—Stopping Trains—Distance—Testimony.

Where witnesses simply testified as to instances in which they had seen similar trains stop at the same place and the distance within which they were stopped, their testimony was not subject to the objection that they were not qualified to testify as to such matters because they had had no experience in operating trains.

Appeal from the District Court of Parker County. Tried below before Hon. J. W. Patterson.

H. C. Shropshire, for appellant.

J. M. Richards and *Bernard Martin*, for appellee.

SPEER, ASSOCIATE JUSTICE.—This suit was instituted by appellee as next friend of the minor children of W. A. Cawthon, deceased, alleging that said Cawthon was killed by one of the defendant's freight trains through the negligence and carelessness of its servants and agents, and resulted in a judgment for the plaintiff in the sum of one thousand dollars, which was divided among the three children of deceased.

The vital issue in the case is one of discovered peril, it appearing that at the time deceased was run over and killed he was lying on appellant's track on a bridge asleep or drunk, or both. The testimony offered by appellant tends very strongly to show that its servants operating the train which killed deceased, did everything in their power, after having discovered the presence of deceased on the track, to avoid injuring him; while on the other hand, there is testimony in the record from which we think the jury might reasonably have found that its servants were negligent in this particular after discovering the perilous

position of deceased on the track. Deceased was lying somewhat near the west end of a trestle known as bridge No. 74, which is shown to be about eighteen hundred feet west of a trestle known as bridge No. 75, and was killed by a west bound freight train. There is testimony in the record from which the jury might reasonably have concluded, and they probably did conclude, that the servants of appellant operating this train discovered the presence of deceased on the track and his peril, when the train was in the vicinity of bridge No. 75, and there is ample testimony to show that this was in time to avoid killing deceased. The testimony of appellant's train operatives as to the distance they were from deceased when they discovered his peril, and that they did everything in their power after such discovery to avoid striking him, is not necessarily conclusive at all upon this issue, but the testimony of other witnesses and the circumstances surrounding the transaction may have been, and we think were, of such cogency as to authorize a finding against appellant upon this issue. This conclusion disposes of appellant's contention that the court should have given a summary instruction to the jury to return a verdict in its favor, and the further contention that the verdict returned and judgment rendered are not supported by the evidence.

Upon the issue of discovered peril the court charged that, "if you believe that W. A. Cawthon was upon one of defendant's bridges on its track and in a dangerous or perilous position, and if you believe from a preponderance of the evidence, while one of the defendant's trains was approaching said bridge, that the engineer operating said train discovered the presence of the said W. A. Cawthon upon said bridge, and discovered his dangerous position in time to have stopped the train before reaching the said W. A. Cawthon by means within his power, and if you further believe that the said engineer negligently failed to use all the means at his command to stop the train before reaching the said W. A. Cawthon without endangering the lives of those upon said train, or the destruction or damage of the defendant's property, and if you believe that by reason of such negligence on the part of the engineer to use the means at his command to stop the train, that the same ran over and killed the said Cawthon, and that the plaintiffs were thereby damaged, you will find for the plaintiffs," etc., and further, "if the said W. A. Cawthon was lying down upon the bridge of the defendant, and if the engineer when he first saw him, if he did see him, thought the object he saw was a log or some other inanimate object, and if later he discovered it was a human being, and if the engineer, after discovering that the object on the track was a human being, used all means in his power to stop the train before striking the said Cawthon, without endangering the lives or safety of those upon said train and without endangering the property of the defendant, the defendant would not be liable, for in such case the defendant was under no duty to the plaintiffs to stop train until the agents in charge of the train knew, or thought, the object upon the bridge was a human being." This was a fair presentation of the issue of discovered peril so far as appellant is concerned, and there was, therefore, no necessity for giving its special charges requested.

Bills of exception numbers 1, 2 and 3 show that appellant objected

to various witnesses testifying to the distance within which such a train as that which killed deceased could be stopped, upon the ground that it did not appear from the statements of the witnesses that they had ever had any experience in operating trains and were therefore not qualified to testify as to such a matter. The bills further show, however, in each instance that the witnesses did not undertake to give an opinion at all, but simply detailed instances in which they had seen similar trains stop at the same place, and the distance within which they were stopped. The testimony was not, therefore, open to the objection made, even though it may have been subject to another objection.

We find no error in the judgment and it is therefore affirmed.

Affirmed.

Writ of error refused.

STATE v. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS.

Decided June 27, 1906.

Railway—Taxation—Assessing Unrendered Property.

The requirement to give the abstract number and number of certificate in rendering lands for taxation (Rev. Stats., arts. 5118, 5119) does not apply to the track of a railway company (Rev. Stats., arts. 5073, 5082), which is required to render its road as an entirety; and the assessor, in placing on the rolls as unrendered a part of the mileage omitted, need not describe it more fully than by giving the length of road omitted as a whole; and foreclosure for the back taxes on the unrendered portion could be had on such undivided part of the line through the county.

Appeal from the District Court of Franklin County. Tried below before Hon. P. A. Turner.

C. W. Stringer, for appellant.

E. B. Perkins and *Glass, Estes & King,* for appellee.

EIDSON, ASSOCIATE JUSTICE.—The statement of the nature and results of the suit contained in appellant's brief, which is conceded by appellee to be correct, is as follows:

"This suit was instituted by the county attorney of Franklin County upon a back assessment compiled under article 5120a, Batts Civil Statutes, to recover delinquent taxes for the years 1888 to 1901, inclusive, upon about one-quarter of a mile of the roadbed of appellee, situated in Franklin County.

"The petition alleged, in substance, that since the year 1888, the appellee has had 11.29 miles of roadbed extending across Franklin County from east to west. That for the years 1888 to 1891, inclusive, 38-100 of one mile of said roadbed was not rendered for taxes in Franklin County and was not placed upon the unrendered roll, the rendition for said years being 10.91 miles, and that the taxes on said fractional part of a mile of said roadbed were delinquent and unpaid. A similar allegation was made with respect to 74-100 of one mile of

said roadbed for the years 1892 to 1898, inclusive and to 25-100 of one mile for the years 1899 to 1901, inclusive.

"That on the 6th day of February, 1904, the tax assessor of Franklin County, after having first ascertained by the certificate of the Comptroller of Public Accounts the fact that the records of his office do not show that said fractional part of a mile of roadbed in Franklin County has been rendered or assessed for the years aforesaid, proceeded to list and assess said property and place said assessment upon a back or additional roll which was duly certified by the Commissioners' Court for collection. That the State and county taxes due and delinquent, as shown by said roll amounted to $561.16, exclusive of interest and penalties.

"The suit was brought in the name of the State of Texas to recover said delinquent taxes upon said back assessment roll for the benefit of Franklin County, praying for judgment and foreclosure of said tax lien and for general relief, to which the defendant's general demurrer was sustained and, the plaintiff refusing to amend, the suit was dismissed.

Opinion.—Appellant assigns as error the action of the court below in sustaining appellee's general demurrer to appellant's petition and dismissing the suit. The record does not disclose the specific grounds upon which the action of the court below was based. We infer from the argument of counsel for appellee contained in their brief in support of the action of the court below, that such action was based upon the supposed ground that the assessor in making the list and assessment of the property for back taxes failed to comply with the statute relating to assessments of this character. If such action of the court was based upon that supposed ground in our opinion it is untenable. Article 5073 of Sayles' Revised Statutes provides that all railroad companies shall list all of their real and personal property, giving the number of miles of roadbed and line in the county where such roadbed and line is situated, at the full and true value; and article 5082, id., provides that it shall be the duty of every railroad corporation in this State to deliver a sworn statement on or before the first day of June of each year to the assessor of each county into or through which any part of their road may run, a classified list of all real estate owned by or in possession of the said company in said county, specifying the whole length of the railroad and the value thereof per mile, which valuation shall include right of way, roadbed, superstructure, depots and grounds upon which said depots are situated, and all shops and fixtures of every kind used in operating said road. Article 5120a, id., provides as follows:

"If the assessor of taxes shall discover in his county any real property which has not been assessed or rendered for taxation for any year since 1870, he shall list and assess the same for each and every year for which it has not been assessed, in the manner prescribed in the preceding article, and such assessment shall be as valid and binding as though it had been rendered by the owner thereof; but no such real property shall be assessed by the assessor unless he has ascertained by the certificate of the Comptroller of Public Accounts the fact that the

records of his office do not show that the property has been rendered or assessed for the year in which he assesses it." And article 5119 referred to in the above quoted article provides that if the assessor of taxes discovers any real property in his county subject to taxation which has not been listed to him, he shall list and assess such property; and specifies the manner of describing the same by giving the name of the owner, abstract number, number of certificate, etc.

In the case of Morgan v. Smith, 70 Texas, 637, the Supreme Court held, in effect, that any requisite of article 5119 need not be complied with where good cause is shown for such non-compliance; and the same doctrine is practically held in the cases of McCormick v. Edwards, 69 Texas, 108, and Henderson v. White, 69 Texas, 104.

Article 5118, Sayles Revised Statutes, provides the same manner and form of assessing real property by the owner as is provided in article 5119 to be complied with by the assessor in assessing unrendered real property. The statute providing for the listing and assessment of the roadbed or line of a railroad by the corporation owning same, does not require that the provisions of article 5118, relating to the manner of assessment of real property by the owner, be complied with, but simply requires that the number of miles of roadbed in the county, and the full and true value thereof be given. This being true, the assessor could not be required to give a more particular description of the property in listing and assessing it for back taxes when the owner had failed to render same, than the owner was required to give in making the rendition itself.

In our opinion the assessor of Franklin County made a legal and valid assessment of the part of appellant's roadbed unrendered by it for the respective years stated in appellant's petition, by giving on the rolls the distance or length of the roadbed not rendered by the appellee for said year, and giving the value thereof as assessed by him, after procuring the required certificate from the Comptroller, and all of these facts are shown by appellant's petition. The law providing that the whole length of a railroad through a county may be assessed for taxes by giving the length thereof and placing a value thereon per mile, in effect, provides for a valuation according to the average value of the entire length of the road through the county; and hence the road is assessed as an entirety and not as so many separate and distinct miles of road, nor as separate and distinct parts of the surveys over which it passes. And if, as alleged in appellant's petition, appellee has failed to render a part of its roadbed for taxation in Franklin County, and the assessor has listed and assessed same, as alleged in said petition, appellant would be entitled to a judgment for the amount of the taxes and a decree for the foreclosure of its lien upon an undivided interest in the roadbed of appellant to the extent shown by the assessment as pleaded by appellant.

In our opinion appellant's petition was not subject to general demurrer, and the court below erred in sustaining such demurrer. The judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

J. B. WATKINS LAND MORTGAGE COMPANY v. HENRY M. THETFORD.

Decided June 27, 1906.

1.—Land Agent—Commissions—Occupation Tax.

The failure of a land agent to pay his occupation tax will not defeat his action to recover commissions for making a sale; the law prohibiting pursuit of the occupation without such payment is a revenue law, and not a regulation of the business on grounds of public policy.

2.—Land Agent—Commission—Procuring Purchaser.

An agent who has procured a purchaser for land whom the owner accepted and contracted with, will not be defeated of his right to commissions by the fact that the purchaser proved unable to carry out such contract.

3.—Same—Subcontract.

Where the owner of land committed the sale solely to an agency selected by him, another, who found a purchaser in pursuance of an agreement with such agency for a division of the commissions, and took no other part in closing the transaction, was not entitled to recover any commission from the owner.

4.—Charge—Ignoring Issue.

A requested charge which ignores an issue supported by evidence and on which a different verdict from that which it calls for might be rendered, should be refused.

5.—Contract—Acceptance of Benefit.

One who accepts and takes the benefit of services performed by another under employment by an agent not authorized to employ, can not avail himself of his agent's lack of authority.

6.—Evidence—What Would Have Been Done.

Testimony as to what would have been done by a party in hypothetical circumstances, was immaterial where the sole issue concerned what was actually done.

Appeal from the District Court of Dallas County. Tried below before Hon. Thomas F. Nash.

W. P. Finley, for appellant.—The failure of the appellee to pay an occupation tax and to obtain a license to pursue the business of a real estate broker, prevents him from maintaining a suit to recover commissions. Rev. Stats., art. 5049; Penal Code, art. 112; Saule v. Ryan, 53 S. W. Rep., 977; Buckley v. Humason, 50 Minn., 195, 36 Am. St. Rep., 637; Amato v. Dreyfus, 34 S. W. Rep., 450; Carey L. Lumber Co. v. Thomas, 22 S. W. Rep., 743; Holt v. Green, 13 Am. Rep., 737; Kenedy v. Schultz, 6 Texas Civ. App., 461; Johnson v. Hulings, 49 Am. Rep., 131; San Antonio St. Ry. Co. v. Muth, 7 Texas Civ. App., 448; Stevenson v. Ewing, 9 S. W. Rep., 230; Peterson v. Seagraves, 94 Texas, 392; Cooley, Tax'n (2d ed.), 572; Roach v. Davis, 54 S. W. Rep., 1070; 2 Benj. Sales (4th Am. ed.), sec. 825; Cooper v. Griffin, 40 N. E. Rep., 712; Haworth v. Montgomery, 18 S. W. Rep., 399; 4 Am. and Eng. Ency. Law (2d ed), 982, and authorities there cited; Whitfield v. Huling, 50 Ill. App., 179; Richardson v. Brix (Iowa), 63 N. W. Rep., 325.

It is familiar law that a contract, prohibited either expressly or impliedly by statute, is illegal, and can not be enforced. Same authori-

ties. Also: Peterson v. Seagraves, 94 Texas, 392; Perkins v. Watkins, 2 Baxt. (61 Tenn), 187; Ohio, etc., Ins. Co. v. Merchants Ins. Co., 11 Humph. (30 Tenn.), 11; Hale v. Henderson, 4 Humph., 200; 2 Benj. Sales (4th Am. ed.), secs. 818-825; 1 Add. Cont., sec. 294; Holt v. Green, 73 Pa. St., 198; Dillon v. Allen, 46 Iowa, 299; McConnel v. Kitchens, 20 S. C., 430; Woods v. Armstrong, 54 Ala., 150; Johnson v. Hulings, 103 Pa. St., 498.

The broker must complete, or consummate, the sale, to this extent, that is, he must find a purchaser, who is not only ready and willing, but able, and in a situation, to complete the purchase on the terms agreed upon, before he is entitled to recover his commissions. Wilson v. Clark, 9 Texas Ct. Rep., 512; McGavock v. Woodlief, 20 Howard, 221; Kennedy v. Clark, 1 App. C. C., sec. 843, p. 483; Brackenridge v. Claridge, 91 Texas, 527; McLane v. Goode, 68 S. W. Rep., 707; Smye v. Groesbeck, 7 Texas Ct. Rep., 480; De Cordova v. Bahn, 74 Texas, 645; 14 Cent. Law Journal, 204-5; Mullenhoff v. Gensler, 15 N. Y. Supp., 673; Coleman v. Meade, 13 Bush. (76 Ky.), 358; Butler v. Baker, 17 R. I., 582, 33 Am. St., 897; 4 Am. and Eng. Ency. Law (2d ed.), 975; Pratt v. Hotchkiss, 10 Ill. App., 603; Iselin v. Griffith, 62 Iowa, 668; Goss v. Broom, 31 Minn., 484; Cook v. Kroemeke, 4 Daly, 268; Hart v. Hoffman, 44 How. Pr., 168.

U. F. Short, for appellee.—The failure of the land agent to pay the occupation tax imposed by article 5049, Sayles' Texas Civil Statutes, will not bar his right to recover commissions earned in effecting sales. Amato v. Dreyfus, 34 S. W. Rep., 450; Fort Worth & D. C. Ry. v. Carlock, 75 S. W. Rep., 931.

A broker is entitled to compensation when he secures a purchaser with whom his principal is satisfied, and who actually contracts for the property at a price satisfactory to the owner. Conkling v. Krakauer, 70 Texas, 739; Durnham v. Upton, 54 N. E. Rep., 873; Coleman v. Meade, 13 Bush, 358; Francis v. Baker, 47 N. W. Rep., 452; Wilson v. Mason, 49 Am. St. Rep., 164-5; Seabury v. Fidelity, etc., Ins. Co., 54 Atl. Rep., 899; 9 Ballard's Real Property, 661; Ward v. Cobb, 12 Am. St. Rep., 587; Fitzpatrick v. Gilson, 57 N. E. Rep., 1000; Donohue v. Flanagan, 28 N. Y. St. Rep., 757; Wray v. Carpenter, 25 Am. St. Rep., 265; Midland Ry. Co. v. Fisher, 21 Am. St. Rep., 192; Ross v. Smiley, 70 Pac., 766.

EIDSON, ASSOCIATE JUSTICE.—Appellee brought this suit in the court below against appellant to recover commissions for his services as a real estate agent in procuring a purchaser for certain real estate owned by appellant and situated in the city of Dallas. The trial before the court and jury resulted in a verdict and judgment in favor of appellee for the sum of $1,196.

Appellant's first assignment of error complains of the action of the court below in sustaining appellee's special exceptions to that part of appellant's answer which sets up as a defense to this suit the failure of appellee to pay his occupation tax as a land agent or real estate broker prior to the transaction upon which this suit is based, appellant's contention being that under the laws of Texas the failure of the

appellee to pay his occupation tax and to obtain a license to pursue the business of real estate agent or broker prevents him from maintaining this suit to recover his commissions, which he alleges accrued to him in the pursuit of such business. We do not think this contention is sound. In our opinion it was not the purpose or intention of the statute providing for the payment of an occupation tax by a real estate agent or broker to make such payment a prerequisite to his right to pursue the occupation. The civil statutes providing for the tax, and the penal statutes making it a misdemeanor to pursue the occupation without paying the tax, were enacted for the purposes of providing a source of revenue for the State and the enforcement of the collection thereof. In the case of Amato v. Dreyfus, 34 S. W. Rep., 450, the San Antonio Court of Civil Appeals, in a case involving this question, uses this language, which we approve:

"It is plain to us that the primary object of the statute is to provide revenue, and that it was not its purpose to repress or prohibit the several occupations it undertakes to license. The provision is that no person shall pursue any occupation unless he has such a receipt, which means that the person is prohibited, not the occupation. No consideration of public policy, nor one looking to the regulation of the business, enters into the statute in question. The purpose sought to be subserved, is altogether different. It could with as much propriety be asserted that a merchant carrying on business under the same circumstances would not be allowed to enforce payment for goods sold, nor a banker for money loaned." And the Fort Worth Court of Civil Appeals in the case of Railway Co. v. Carlock, 75 S. W. Rep., 931, in passing upon the question as to whether a lawyer was entitled to practice his profession without first paying the occupation tax (the statutes with respect thereto applying to lawyers as well as to land agents) held that he was, and referred to the case of Amato v. Dreyfus, supra, with approval.

Appellant's third, fourth and seventeenth assignments of error are based upon the proposition that the purchaser procured by the appellee was not able pecuniarily to comply with his contract for the purchase of the land, or to respond in damages for a failure so to do, and for that reason, appellee was not entitled to commissions for procuring such purchaser. Under a different state of case, this proposition might be correct, but the pleadings and uncontroverted testimony in this case show that the purchaser was satisfactory to appellant, and that it contracted with the purchaser for the sale of the property at a price satisfactory to it; hence the question as to whether the purchaser was able to carry out the contract is not involved in this case. (Conkling v. Krakauer, 70 Texas, 739.)

The paragraph of the charge of the court complained of in appellant's fifth assignment of error was favorable to it, and it has no ground for complaint.

Appellant's sixth assignment of error is overruled. The appellee and the witnesses Bird and Irwin testified to facts that would authorize the charge of the court complained of in this assignment. There was sufficient testimony to justify the court in submitting the case to the

jury and to support the verdict. Hence appellant's seventh and sixteenth assignments of error are overruled.

In our opinion the special charges asked by appellant and refused by the court and which are embraced in appellant's ninth, eleventh and fourteenth assignments of error should have been given to the jury. If the sale was made by Bird, Robinson & Co. with the assistance of appellee, under an agreement with them to divide their commissions with him, he would not be entitled to recover anything against appellant for his services. There is some testimony in the record tending to support this view of the transaction. Appellee testified that he asked Bird for a price on the lot, and told him that he had some hopes of getting him a buyer; that he knew that Bird, Robinson & Co. were the exclusive agents of appellant, and that he understood that the lands of appellant could only be handled through them, and that he was privileged to offer this property for sale through them, and that he made the contract in this instance through them; and Robinson testified, in substance, that the sale was made by Bird, Robinson & Co. with the assistance of appellee; that he furnished the customer but that Bird, Robinson & Co. made the contract of sale, and that Higgins, the representative of appellant who came to Dallas and closed the contract with the purchaser, consulted with Bird, Robinson & Co. in the matter, and had nothing to do with appellee in the negotiations which culminated in the contract for the sale of the lot, and appellee did not participate in such negotiations and was only present at some of the interviews on account of his having furnished the purchaser; that appellee asked witness about the commissions he, appellee, would get and he, witness, discussed the commissions with him and the contract as the contract of Bird, Robinson & Co., and appellee knew that other agents could only get one-half of the commissions. Higgins's testimony is to the effect that in negotiating and closing the contract of sale with the purchaser, he acted with Bird, Robinson & Co. and not with appellee. This testimony, in our opinion, was sufficient to require the court to give to the jury said special charges, and the refusal to give them constitutes reversible error.

There was no error in the refusal of the court to give to the jury appellant's special charge number 6, as it ignored the right of appellee to recover in the event Higgins acted with him in making the contract of sale; or, in other words, it ignored the theory that the efficient cause of the contract of sale was Higgins's acting with appellee and accepting his services as a land agent in the transaction, knowing him to be such agent at the time, although he, Higgins, may have acted with Bird, Robinson & Co. in some matters respecting the sale.

Appellant's thirteenth assignment of error is overruled. If appellee made the sale in question, the fact that appellant accepted it and claimed the benefits thereunder would preclude its setting up the want of authority of Higgins to employ appellee to make the sale.

The issue sought to be injected into the case by appellant's special charge number 10, not being in any manner involved in the case, said special charge was properly refused.

The testimony, exclusion of which is complained of in appellant's eighteenth assignment of error, was immaterial. What the appellant

did do in reference to the transaction in question was material, but what it would have done under circumstances not existing was immaterial.

For the errors above indicated, the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

E. M. FOWLER ET AL. v. JOHN A. AGNEW.

Decided June 27, 1906.

Estates of Decedents—Administration Closed—Suit by Heirs.

The administration of an estate having been closed, leaving debts unpaid, the heirs could maintain suit to recover a tract of land turned over by the administrator, as being included in the sale, to a purchaser of property from him, but which was in fact never included in the property inventoried nor embraced in the sale.

Appeal from the District Court of Fannin County. Tried below before Hon. Ben. H. Denton.

McGrady & McMahon, for appellants.—The heirs own the land by law and are entitled to recover the same as against all the world where their demands do not conflict with an administration of the estate. Rev. Stats., 1869, 1880, 1924, 3358; Giddings v. Steele, 28 Texas, 732, 748; Fisk v. Norvel, 9 Texas, 13; Walker v. Abercrombie, 61 Texas, 69; Baker v. Hamblen, 75 S. W. Rep., 362; Thomas v. Hawpe, 80 S. W. Rep., 129; Herndon v. Davenport, 75 Texas, 462; Jones v. Pyron, 57 Texas, 47; Shields v. Hunt, 45 Texas, 428.

Wheeler & Cunningham, for appellee.—The surviving wife and children of an intestate can not, in their own names and for their own benefit, maintain a suit for the recovery of property not administered, belonging to said intestate at the time of his death, and subject to the payment of his debts, when the value of said property is far less than the amount of the unpaid probated claims against said estate. Rev. Stats., arts. 1924, 2012, 2013; Herbert v, Herbert, 59 S. W. Rep., 594; Fort v. Fitts, 66 Texas, 593; Peveler v. Peveler, 54 Texas, 53.

FISHER, CHIEF JUSTICE.—This is an action by the heirs of J. W. Palmore in trespass to try title to recover the tract of land in controversy. The case was tried before the court and judgment rendered in favor of the defendant Agnew. The court below filed conclusions of fact and law, which are as follows:

"J. W. Palmore married plaintiff E. M. Fowler —— day of ——, 1871, and they lived together as husband and wife in Fannin County until the death of J. W. Palmore, which occurred January 15, 1897. He died intestate leaving as his only heirs his children by said wife, to wit, Pearl Staats, wife of Wm. Staats, John Palmore and Virginia Palmore, minors.

"During such marriage, on to wit, February 18, 1887, the land in controversy was deeded by H. A. McDonald to J. W. Palmore, for a recited consideration of $100 paid and thereby became the community

property of the said J. W. Palmore and his said wife, and J. W. Palmore, immediately after such purchase took actual possession of said land and continued in such possession until his death. He died intestate and at the time of his death owned a large estate of value of $15,000, and owing debts to the amount of $20,000; administration was duly granted in County Court of Fannin County upon estate of said J. W. Palmore and administration continued open and administrator continued to act until the regular April term, 1899, at which term and on to wit, April 19, 1899, the final report of the administrator was approved, administration closed and administrator discharged by an order of said County Court duly entered in term time. In such administration and County Court the debts against said estate were probated to the amount of $20,000, on which the administrator paid 68 percent, leaving a balance unpaid on probated claims of $4,500. The probate proceedings showed that all the property inventoried was disposed of, all sold except the exempt property which was set apart to the widow and minor children. The inventory of said estate showed that the land in controversy was never inventoried, and it was never disposed of in the administration proceedings. The administrator of said estate as such held possession of land in controversy until April 12, 1898, at which time he delivered possession to defendant, the administrator C. A. Wheeler and defendant supposing that it was included in and a part of the land for which administrator on that day made a deed to defendant, but which supposition was a mistake in fact on part of the administrator and defendant. Neither the defendant nor any other person for him has ever paid any taxes on land in controversy, and defendant has no deed for land in controversy—taxes on land in controversy have been unpaid since 1898.

"The defendant has in good faith made permanent and valuable improvements on land in controversy, believing same to be his property, such improvements consisting of erection of a fence on two sides and making a pool thereon. The value of land in controversy, exclusive of improvements placed thereon by defendant, I find to be $106.75 and the value of such land including the improvements so placed thereon by defendant, I find to be $181.75.

"I find that the rental value of the land, exclusive of improvements made by defendant during time defendant has had possession thereof and alleged by plaintiffs, to wit, from January 1, 1903, up to time of trial, is the sum of $10 and defendant has used and appropriated such use and rental value thereof, and if plaintiffs were entitled to recover the land, they would be entitled to recover of defendant $10 for use and rents thereof. That said surviving wife of J. W. Palmore married plaintiff J. B. Fowler on June —, 1904, and her name is now E. M. Fowler. No other administration has ever been had on estate of said J. W. Palmore, deceased.

"*Conclusions of Law.*—1. I conclude as a matter of law that plaintiffs are not entitled to recover the land in controversy, because the estate of J. W. Palmore is insolvent and the unpaid probated claims against his estate amount to more than the value of the land, and this being so, the heirs of J. W. Palmore, deceased, have no such title or

right to the land as would entitle them to recover same. To this conclusion of law the plaintiffs duly except.

"2. But for my first conclusion of law, the plaintiffs, constituting the surviving wife and only heirs of J. W. Palmore, deceased, would be entitled to recover of defendant the land sued for, and the rental value thereof aforesaid, but in such event defendant would be entitled to recover for his improvements aforesaid to extent of $75. To this conclusion of law defendant excepts.

"3. I conclude that defendant is not entitled to have reformed the deed made to him by C. A. Wheeler as administrator of estate of J. W. Palmore, deceased, April 12, 1898, and that such does not embrace the land in controversy and such deed does not entitle defendant to hold the land. To this conclusion of law defendant excepts."

We are inclined to the opinion that the facts as stated bring this case within the exception recognized in Baker v. Hamblen, 75 S. W. Rep., 362; Walker v. Abercrombie, 61 Texas, 69; Herndon v. Davenport, 75 Texas, 462, and other cases that might be cited. We agree with the trial court, under the facts as stated, that if the appellants are entitled to recover, the appellee is entitled to a judgment in his favor for the value of the improvements. The findings of the court being complete upon this question, judgment will here be entered to the effect that the judgment of the trial court is reversed and here rendered in favor of appellants that they recover the land in controversy, and in favor of appellee for the value of the improvements.

Reversed and rendered.

Writ of error refused.

J. C. KARNER v. S. J. ROSS.

Decided June 27, 1906.

1.—Plea of Privilege—Waiver.

In an action for fraud, after defendant's plea of privilege to be sued in his own county was overruled, plaintiff amended alleging the fraud to have been committed in the county where the suit was brought. Defendant, who plead to and went to trial on such amended petition without reasserting his plea of privilege, waived same thereby and submitted to the jurisdiction.

2.—Pleading—Fraud—Materiality.

General allegation of the materiality of fraudulent representations charged, with facts pleaded from which it might be inferred, was sufficient as against a general demurrer.

3.—Fraud—Written Contract—Parol Evidence.

Objections to parol evidence as varying a written contract do not apply to an action to recover for fraud therein.

4.—Impeachment—Declarations of Party.

Declarations of a party to the suit are admissible against him without laying a predicate in his examination for impeaching him thereby.

Appeal from the County Court of Hunt County. Tried below before Hon. F. M. Newton.

A. B. Reynolds and *Jones & Conner,* for appellant.—On plea to

jurisdiction. Facts must show actionable fraud: Freeman v. Kueckler, 45 Texas, 592; Baines v. Mensing, 75 Texas, 200; McLaughlin v. Shannon, 3 Texas Civ. App., 136. A promise unperformed, not fraud: Chicago T. & M. Ry. v. Titterington, 84 Texas, 218; Baines v. Mensing, 75 Texas, 200. Joining a defendant against whom is no cause of action: Weeks McCarthy v. Sunset B. & T. Co., 22 Texas Civ. App., 556; Texas & P. Ry. Co. v. Mangum, 68 Texas, 346; Roan v. Raymond, 15 Texas, 78.

Must allege facts showing the fraud to be a material inducement: Bremond v. McLean, 45 Texas, 10; Moore v. Cross, 87 Texas, 557.

Oral evidence inadmissible to vary contract: Foote v. Frost, 39 S. W. Rep., 328; Wolfe Cigar Stores v. Kramer, 14 Texas Ct. Rep., 46; Jones v. Ferd Heim Brewery Co., 44 S. W. Rep., 896.

Yates & Carpenter, for appellee.—On right to rescind contract for fraud: Jesse French Piano Co. v. Nolan, 85 S. W. Rep., 821; Halsell v. Musgrave, 5 Texas Civ. App., 479. Parol evidence to show fraud in procuring contract: Halsell v. Musgrave, 5 Texas Civ. App., 479; Turner v. Grobe, 44 S. W. Rep., 906; American Cotton Co. v. Collier, 69 S. W. Rep., 1024; Davis v. Driscoll, 22 Texas Civ. App., 14; American National Bank v. Cruger, 14 S. W. Rep., 1016; 1 Elliott on Evidence, sec. 592.

EIDSON, ASSOCIATE JUSTICE.—This suit was originally brought in the court below by appellee against appellant and the Greenville National Bank to rescind a contract and cancel two notes for $147 each, and in the alternative to recover the value of said notes against appellant. By amendment appellee dismissed the band from the suit, and sought to recover the value of said notes from appellant on the ground of fraud in their procurement. A trial before a jury resulted in a verdict and judgment for appellee in the sum of $294, with interest.

Appellant's first assignment of error complains of the action of the court below in overruling his plea of privilege to be sued in the county of his residence. After this plea was presented to the court and overruled, appellee amended his petition and alleged that the fraud used by appellant in the procurement of the notes, the value of which he sued for, was committed in Hunt County, where the suit was brought, which allegation gave the court trying the case jurisdiction. (Sayles' Rev. Stats., art. 1194, 7th subd.) Appellant answered to this amended petition and went to trial without urging or presenting for action of the court his plea of privilege as against the cause of action set up in said amended petition. By this failure or omission on his part, appellant waived his plea of privilege to be sued in the county of his residence, and submitted his person to the jurisdiction of the court trying the case. (Hall v. Howell, 56 S. W. Rep., 561; Watson v. Baker, 67 Texas, 50; Floyd v. Gibbs, 34 S. W. Rep., 154.)

Appellee's petition was not subject to general demurrer, and we therefore overrule appellant's second assignment of error. If facts showing the materiality of the fraudulent representations alleged to have been made by appellant in the procurement of the notes are not specifically alleged in the petition, there is a general allegation of the materality

of such fraudulent representations, and facts are alleged from which their materiality may be inferred, which is sufficient as against a general demurrer.

The testimony admission of which is complained of in appellant's third, fourth and fifth assignments of error, was properly admitted. The rule as to the exclusion of parol testimony tending to vary, add to or contradict a written instrument does not apply to a case of this character. (Halsell v. Musgraves, 5 Texas Civ. App., 479; Turner v. Grobe, 44 S. W. Rep., 906; American Cotton Co. v. Collier, 69 S. W. Rep., 1024; Davis v. Driscoll, 22 Texas Civ. App., 14; American Natl. Bank v. Cruger, 14 S. W. Rep., 1016; 1 Elliott on Evidence, sec. 592.)

There was no error in the admission of the interrogatory and answer thereto contained in the deposition of J. C. Karner. He being a party to the record, no predicate was required for the admission of this testimony.

The testimony, as shown by the record, was sufficient to support the verdict of the jury, and therefore the court below did not err in overruling appellant's motion for a new trial.

The judgment of the court below is affirmed.

Affirmed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS v. J. L. RUTHERFORD.

Decided June 27, 1906.

1.—Railway—Extortion—Penalty—Pleading.

A petition seeking to recover from a railway excessive charges collected, with penalty for extortion, which substantially alleges that defendant charged and collected a greater rate for the use of the car than was fixed or authorized by law, held good as against general demurrer.

2.—Demurrage.

The consignee of a car of freight, on payment of the transportation charges, was entitled to 48 hours clear time, exclusive of Sunday, to unload same; and where the carrier, after interfering with the unloading during a part of this time by switching the car to a place where it was impracticable, compelled payment of demurrage before permitting unloading to continue it is liable for the overcharge and penalty.

3.—Same—Defense—Pleading.

The defense that the charge for demurrage was exacted innocently, in ignorance of the fact that the unloading had been interfered with by defendant during a part of the time allowed, must be pleaded by defendant, in order to be available.

Appeal from the District Court of Franklin County. Tried below before S. P. Pounders, Esq., Special Judge.

Glass, Estes & King and *E. B. Perkins,* for appellant.—The general demurrer to the petition should have been sustained, because it was not alleged that the Railroad Commission had established a rate for demurrage and the defendant had exacted a greater. Rev. Stats., 4573,

4575; Houston, E. & W. Ty. Ry. v. Campbell, 91 Texas, 558; Conley v. Sherman S. & S. Ry. Co., 90 Texas, 257; State v. International & G. N. Ry., 4 Texas Ct. Rep., 773; St. Louis S. W. Ry. Co. v. Hill & Morris, 80 S. W. Rep., 368.

The evidence shows conclusively that plaintiff was not entitled to recover a penalty, and that therefore, the $4 sued for as overcharge was not within the jurisdiction of the District Court. St. Louis S. W. Ry. Co. v. Hill & Morris, 80 S. W. Rep., 368; Houston, E. & W. T. Ry. Co. v. Campbell, 91 Texas, 558; Conley v. Sherman S. & S. Ry. Co., 90 Texas, 257.

R. T. Wilkinson, for appellee.—The petition was good as against general demurrer. Rev. Stats., arts. 4573, 4575; Houston & T. C. Ry. Co. v. Lone Star Salt Co., 19 Texas Civ. App., 684.

The facts entitled plaintiff to recover: Rev. Stats., arts. 4573, 4575.

It was not necessary for the plaintiff to allege nor prove that the charges were knowingly made, but if such charges were innocently made, the statute makes this a defense that may be urged by the railway company. Luens v. Petty, 2 Texas Ct. Rep., 857.

EIDSON, ASSOCIATE JUSTICE.—This suit was brought in the court below by appellee against appellant to recover the penalty provided by the statute for extortion by railroads in this State, and also to recover for excessive charges alleged to have been collected as demurrage by the agent of appellant at Mount Vernon, Texas, for the use of a car shipped to that place by appellant loaded with brick. The trial before the court without a jury resulted in a judgment in favor of appellee in the sum of $127, this amount consisting of $125, the statutory penalty for extortion, and $2 excessive charges.

By its first assignment of error appellant complains of the action of the court below in overruling its general demurrer to appellee's petition. In our opinion appellee's petition is not obnoxious to a general demurrer. The petition substantially alleges that the appellant charged and collected a greater rate for the use of the car than was fixed or authorized by law, and this was sufficient as against a general demurrer.

Appellant's second assignment of error is overruled. Appellee under the law was entitled to the free and unmolested use of the car for the purpose of unloading the same for 48 hours from and after noon on Saturday, December 14, 1901, exclusive of Sunday; and the court found, and the testimony supports such finding, that appellee was prevented by the acts of appellant from using the said car to unload same for eight hours within said 48 hours and that appellant took possession of said car and sealed up same before appellee had unloaded the same or had the use of the same the 48 hours allowed him by law within which to unload same, and would not permit appellee to take possession of the car and resume or complete the unloading thereof until two days thereafter, and after it had demanded of and collected from appellee, over his protest, the sum of $2 as demurrage, and that appellee had previously paid to appellant the legal charges for the car, including its use in unloading same. When a railroad company makes

a contract to transport an article or commodity from one point to another at a certain rate, the contract includes the use of the car during the 48 hours allowed by law for unloading same. The amount fixed by law through the Railroad Commission for the transportation of the car of brick in question from Sulphur Springs to Mount Vernon being $10, this amount covered the compensation to the railroad company for the use of the car the 48 hours allowed by law for unloading it; and appellant's act in demanding and collecting from appellee $1 per day for the use of said car prior to giving him the use thereof the 48 hours allowed by law for unloading same, made it guilty of extortion as defined by article 4573, Sayles' Revised Statutes.

What has just been said in passing upon appellant's second assignment of error disposes of its third, fourth and fifth assignments. And further, it is not necessary, in order to show a railroad company guilty of extortion under the statute, that it be alleged and proven that the excessive charge was knowingly made. If such excessive charge was unintentionally and innocently made through a mistake of fact, it was a matter of defense for appellant to plead and prove, and there was no such pleading by appellant in this case. (Art. 4575, Sayles' Rev. Stats.) We adopt the findings of fact of the court below, the same being supported by the evidence.

All of appellant's assignments of error are overruled, and the judgment of the court below is affirmed.

Affirmed.

L. J. PATTERSON ET AL. v. HILL COUNTY ET AL.

Decided June 27, 1906.

Public Road—Consent—Jurisdiction.

Owners of land who have agreed to donate same for a public road and waive their claim for damages if the county would establish and maintain it can not question the validity of the order of the Commissioners' Court directing the opening of it on the ground that the proceedings were irregular and insufficient to give the court jurisdiction.

Error from the County Court of Hill County. Tried below before Hon. N. J. Smith.

Walker & Scruggs and *A. P. McKinnon,* for plaintiff in error.—Commissioners' Court can not exercise jurisdiction to open a road until notice has been given by the jury of view, authorized to assess the damages. McIntire v. Lucker, 77 Texas, 259; Vogt v. Bexar County, 5 Texas Civ. App., 277; Bowie County v. Powell, 66 S. W. Rep., 238.

Adequate compensation must be paid or deposited for the land taken, regardless of benefits which can not be offset against adequate compensation for land taken. Travis County v. Troydon, 88 Texas, 302; Evans v. Santana Live Stock Co., 81 Texas, 622.

When a road is located without notice damages can be recovered by suit in court having jurisdiction of amount. Bowie County v. Powell, 66 S. W. Rep., 238; Llano County v. Scott, 2 Texas Civ. App., 412;

Cunningham v. San Saba County, 1 Texas Civ. App., 483; McIntire v. Lucker, 77 Texas, 259; Bounds v. Kirven, 63 Texas, 160.

L. C. Hill and *Frazier & Basham,* for defendants in error.

KEY, ASSOCIATE JUSTICE.—This is a suit to recover damages from Hill County for the alleged wrongful taking of certain land for a public road. The plaintiffs' petition alleged that the Commissioners' Court of the county had made an order establishing the road and requiring it to be opened, a copy of which order is attached to and made a part of the petition. The order referred to recites the fact that the owners of the land affected by the establishment of the road had waived their claims for damages and donated the right of way to the county. The petition does not controvert this recital, but contends that the Commissioners' Court had no jurisdiction to establish and open up the road, because of the failure to comply with certain provisions of the statute regulating such matters.

If it be true, as appears from the minutes of the Commissioners' Court, that the owners of the land upon which it was sought to establish the road agreed to donate the land and waive their claim for damages if the county would establish and maintain the road, we do not think such owners can be heard to question the jurisdiction of the Commissioners' Court. Hence we hold that the trial court ruled correctly when it sustained a general demurrer to the petition.

Judgment affirmed.

COMMERCIAL TELEPHONE COMPANY v. J. R. DAVIS.

Decided June 28, 1906.

1.—Charge—Assuming Unquestioned Facts.

Instructions should not treat as doubtful facts which are unquestioned, but may assume that they exist.

2.—Damages—Personal Injury.

Evidence considered and held to sustain a recovery of $5,000 for personal injury to a traveler on the highway, through his horse getting entangled in a wire negligently permitted to fall down by a telephone company.

Appeal from the District Court of Chambers County. Tried below before Hon. L. B. Hightower.

Stevens & Pickett, for appellant.—On excessive verdict: International & G. N. Ry. Co. v. Underwood, 64 Texas, 469; Railway Company v. Buckalew, 3 Texas Civ. App., 622; Texas & P. Ry. v. Morin, 66 Texas, 225; I. G. N. Ry. v. Hall, 15 S. W. Rep., 108; St. Louis Ry. v. Finley, 15 S. W. Rep., 390.

Marshall & Marshall, for appellee.—That the court in its charge may assume a fact proven where there is no controversy, or where the evidence is undisputed, we cite: Wintz v. Morrison, 17 Texas, 387; International & G. N. Ry. Co. v. Stewart, 57 Texas, 170; Artusy v. Missouri

Pac. Ry. Co., 73 Texas, 194; Capp v. Terry, 75 Texas, 403; Beaumont Pasture Co. v. Preston, 65 Texas, 452.

The verdict of the jury for five thousand dollars is not excessive in light of the evidence, but is fully supported by same. Missouri Pac. Ry. Co. v. Aiken, 71 Texas, 379; Missouri Pac. Ry. Co. v. Johnson, 72 Texas, 103; Missouri, K. & T. Ry. Co. v. Cook, 12 Texas Civ. App., 543; East Line & Red River Ry. Co. v. Smith, 65 Texas, 173; Western U. Tel. Co. v. Broesche, 72 Texas, 659; Ft. Worth & N. O. Ry. Co. v. Wallace, 74 Texas, 585; Cook v. Garza, 9 Texas, 362; Brocke v. Clark, 57 Texas, 113.

REESE, ASSOCIATE JUSTICE.—J. R. Davis instituted this suit against the Commercial Telephone Company to recover $30,000 damages for personal injuries. It is alleged that while plaintiff was riding along the public road from Liberty to Wallisville his horse became entangled in a telephone wire put up by defendant, across said public road, and which it had negligently allowed to be down, resulting in plaintiff being thrown from his horse and receiving the injuries of which he complains. There was a verdict for plaintiff for $5,000, from the judgment upon which defendant appeals.

It is assigned as error that in its charge the court assumed the existence of certain material facts about which there was a controversy. The assignments presenting the question do not specify what particular facts were so improperly assumed, nor does the statement thereunder enlighten us upon this point. The only facts which can be said to have been assumed are the accident and injury to the appellee. There was no error in assuming that there had been an accident to appellee and that he had sustained injuries thereby. There was no issue raised by the evidence as to these facts. Three witnesses testified for appellee with regard to such accident and injuries, all agreeing in their testimony, and the testimony is not controverted in any particular on this point. "Where there is no conflict in the testimony, and no room to doubt or to hesitate as to a matter of fact in issue, the judge in his charge ought not to assume that it is, or may be, doubtful. . . . Where the evidence to a fact is positive and not disputed or questioned, it is to be taken as an established fact and the court should proceed upon that basis." (Wintz v. Morrison, 17 Texas, 388.)

The issue as to whether the accident was caused by the negligence of appellant was submitted to the jury by proper instructions, and especially by a charge given at the request of appellant.

Appellant also complains that the damages allowed by the verdict and judgment are excessive. The amount awarded appears to us to be very large and we have had much difficulty in determining whether it is not so much so that the verdict should not be allowed to stand. There is, however, nothing in the record, except the amount of the damages awarded, to indicate that the jury were influenced by anything except their honest judgment as to the extent and seriousness of appellee's injuries and the amount of physical and mental suffering undergone by him, in consequence thereof.

Appellee is a lawyer and it appears that he has sustained a fracture of the jaw, which the medical witness calls a "green stick" break, by

which is meant, as explained by him, a crack without any separation of the bone, and also that the lip had been torn loose and lacerated on the inside. There was considerable injury to the neck, from which appellee testified that he was still suffering at the time of the trial, more than a year after the injury was received, and that he could not turn his head without turning his entire body, or move it at all without pain. Appellee testified that from this injury he suffered pain all the time, and at times seriously, that his chin was partly paralyzed and the muscles and ligaments injured. The testimony of the medical man is uncertain and indefinite, but appellee himself testifies quite positively about his injuries and the pain he has suffered, and is still suffering, and his testimony is not attempted to be controverted.

After a most careful examination of this testimony our conclusion is that while the verdict appears to us to be for a larger amount than should have been awarded, we are unable to say that it is so excessive as to indicate that it is the result of passion or prejudice on the part of the jury, or other improper influences, which we must find before we can properly substitute our judgment for that of the jury, in the matter. (East Line & Red River Ry. Co. v. Smith, 65 Texas, 173.) This is especially true in view of the fact that the verdict has undergone the security of the learned and experienced trial judge by whom it is approved.

The record presents no error requiring a reversal of the judgment and it is affirmed.

Affirmed.

Missouri, Kansas and Texas Railway Company of Texas et al. v. Williams and Scoggin.

Decided June 30, 1906.

1.—Shipment of Cattle—Delays—Measure of Damage—Unintelligible Charge—Cook v. Wootters, 42 Texas, 296, Criticised.

In a suit for damage to a shipment of cattle caused by delay in transporting them, the charge of the court upon the measure of damage was unintelligible; no exception was taken to the charge and no counter-instruction asked by appellant. Held, the rule announced in Cook v. Wootters, 42 Texas, 296, that such error is not ground for reversal "unless it clearly appeared that the jury were misled by the charge given and complained of," is not supported by authority. It is the duty of the Appellate Court to reverse for error plainly appearing, unless it can be said from a consideration of the entire record that injury to the complaining party did not result.

2.—Same—Shrinkage of Cattle—Conflicting Testimony.

Where the testimony of disinterested witnesses who actually weighed the cattle in controversy at the point of shipment and at destination was widely variant from that of witnesses who testified as experts upon hypothetical questions as to the probable shrinkage of cattle under similar circumstances, and the verdict was contrary to the testimony as to the actual shrinkage, the Appellate Court can not say that an error in the charge of the trial court upon the measure of damage was not prejudicial to appellant.

3.—Privileged Communication—Corporation—Attorney.

A letter between the general attorney of a corporation and the local attorney of such corporation, concerning an issue on the trial, is a privileged communication.

4.—Letter of Agent—Market Values—Incompetent Evidence.

A letter and telegram from plaintiff's agent at the stock yards are incompetent evidence of market values at the times stated therein.

5.—Taking Depositions—Notice of Date.

Where the agent of the opposite party appeared at the time and place stated for taking the deposition of a witness, but the taking of such deposition was postponed to a later date without objection on the part of such agent, the postponement is not ground for quashing the deposition.

6.—Transcript—Superfluous Matter—Cost.

When the transcript contains superfluous matter not made the basis of any assignment of error the extra cost of such matter will be taxed against the appellant.

Appeal from the County Court of Mitchell County. Tried below before Hon. W. B. Crockett.

T. S. Miller and *Whitaker & Gibbs,* for appellants.—Where the court charges the jury on the main issue in the case, and in giving such charge, gives it in such a manner that it can not be comprehended by the jury, it is error. Acts of 1903, p. 55; Chambee v. Tarbox, 27 Texas, 145; Beazley v. Denson, 40 Texas, 433; Gulf, C. & S. F. Ry. Co. v. Stanley, 89 Texas, 44; St. Louis S. W. Ry. Co. of Texas v. Smith, 32 S. W. Rep., 828; Houston, T. C. Ry. Co. v. Williams, 31 S. W. Rep., 559.

Where a witness testifies by deposition and his evidence is undisputed, the jury can not disregard his testimony. Thorn's Heirs v. Frazer's Heirs, 60 Texas, 260; Henderson v. Jones, 1 Texas Law Review, 356.

Ed. J. Hamner, for appellees.

CONNER, CHIEF JUSTICE.—Appellees instituted this suit against appellants and the Texas and Pacific Railway Company, for damages in the sum of $1,000, on the ground of alleged negligent delays in the transportation of 333 cattle from Colorado City, Texas, to Kansas City, Missouri. The shipment was via the Texas and Pacific Railway to Fort Worth, Texas, where the M., K. & T. Ry. Co. of Texas received the cattle and transported them to Denison, Texas, at which latter point they were delivered to the M., K. & T. Ry. Co., which completed the shipment. The trial resulted in a judgment for appellees against the Texas & Pacific Railway Company for the sum of $50; against the Missouri, Kansas & Texas Railway Company of Texas for $316.66 2-3; and against the Missouri, Kansas & Texas Railway Company for $633.33 1-3. The latter two companies alone appeal.

Complaint is first made of the court's charge upon the measure of damages. The charge is in the following words: "The measure of damages in this case is the difference between the market value of these cattle in Kansas City in the condition and at the time in which they should have arrived there, the difference in and their market value at the time and in the condition in which they should have arrived there, transported with ordinary diligence." That this charge fails to give the proper measure of damages and is unintelligible is conceded. Appellees insist, however, upon the authority of Cook v. Wootters, 42 Texas, 296,

that inasmuch as no exception was taken to the charge and no counter instruction asked on behalf of appellants, that the error will not be sufficient ground for the reversal of the judgment "unless it clearly appeared that the jury were misled by the charge given and complained of." The language to this effect used in the case of Cook v. Wootters was not necessary to the decision and evidently not intended as an announcement of the general rule, or if so, is not supported by a single case therein cited in support of the decision. On the contrary, we think the cases cited support the rule which we understand to be now well established, that the duty of the Appellate Court is to reverse for error plainly appearing, unless it can be said from a consideration of the entire record that injury to the complaining party did not result. A careful consideration of the record in the light of this rule impels the conclusion that the judgment should be set aside.

The evidence shows that the cattle were delivered in the Ft. Worth Stock Yards at 11:30 a. m. on Tuesday, December 14, 1904, and were not shipped out from this point on the M. K. & T. Railway of Texas until about 2 o'clock p. m. of the next day. This delay constituted one of the principal delays of the shipment after leaving Colorado City. The cattle were fed and watered at Fort Worth; the trainmen testify to careful handling; and E. B. Carver, who sold the cattle in Kansas City for appellees, testified that they arrived in "fair condition." Appellees' evidence on the issue of damages is that of expert witnesses only, and it also appears that Sam McLaughlin, the sole agent of the appellees in charge of the cattle in question from Fort Worth to Kansas City, was not called as a witness. J. M. Williams, one of the appellees, and whose testimony is perhaps most favorable to them, testified as an expert that the unnatural shrinkage of the cattle, because of the delays shown, "over and above what they would have shrunk had they been transported with reasonable care, diligence and dispatch, was from forty to fifty pounds per head, and that this unnatural shrinkage would cause them to sell from fifteen to twenty-five cents per cwt. less." He also testified that "the market at Kansas City on Friday, the day the cattle were sold, was from fifteen to twenty cents per cwt. less than it was on Thursday, the day they should have been sold." Damages estimated upon this testimony as a basis, will doubtless be found to equal the verdict as appellees urge. Appellants, however, proved by the deposition of J. Conway that he weighed the 333 cattle at Fort Worth immediately preceding their delivery to the stock yards; that their net weight was 240,100 pounds, or an average of 721 pounds each. Appellants also proved by the deposition of E. B. Carver that he weighed 331 head of appellee's cattle at Kansas City after they were fed and watered at that point; that they then weighed 242,015 pounds, or an average of 731. W. Lake Henry testified that he also weighed 329 head of the cattle at Kansas City; and that the weight was 239,440 pounds, or an average of 728 pounds. Appellee Williams testified that the reasonable "fill" on cattle such as those involved in this controversy at Fort Worth would be from fifteen to twenty pounds. He also testified that a reasonable and natural shrinkage on cattle transported from Fort Worth to Kansas City was "from no pounds to forty pounds." If this testimony as to actual weights be accepted, and it is uncontradicted, ap-

pellees' cattle in the transportation from Fort Worth to Kansas City could not have depreciated in weight, disregarding all natural shrinkage, more than ten pounds. If the damages be estimated upon the basis of a ten-pound loss upon each animal shipped from Fort Worth to Kansas City, and upon a depreciated selling price of twenty-five cents per cwt. arising from this cause, and of a decline in the market of fifteen cents per cwt., as testified by the witness Williams, the verdict and judgment are largely excessive. Appellees insist that the jury had the right to disregard the testimony of the witness Conway. He testified, however, by deposition; he is not shown to be an employe of either of the appellant companies; and no reason appears of record why his testimony should be disregarded. Neither his testimony nor that of the witnesses Carver and Henry is contradicted except by the testimony of experts, who did not accompany the cattle beyond Ft. Worth, to the effect that in their opinion delays of the hours shown and embodied in the hypothetical questions would result in depreciated weights as stated by them. Mere opinions, even of experts, are usually attended with some degree of uncertainty, and the evidence in this case as a whole is such as to make it doubtful if the jury reached the right result. It was at least important to the rights of the appellants that the court should not improperly instruct the jury upon the measure of damages. Revised Statutes, article 1317, requires the court to charge the jury "the law arising on the facts," and we feel unable to say that the charge given was not misleading and prejudicial.

Several other questions should perhaps be noticed. The court, over the objection that it was a privileged communication, compelled appellants' local counsel to give in testimony the contents of a letter received by him from appellants' general attorney relating to an issue arising on the trial. Under the circumstances shown, we fail to see why the contents of the letter were not privileged within the meaning of the general rule on the subject. The general attorney, it is true, was not the corporation, but a corporation can act only by its officers and he was the officer having general supervision and control of all litigation, including this; he employed the counsel testifying, and it would seem that in relation to the matter under consideration, the general attorney would be the *alter ego* of the corporation, and that hence the communications between him and local counsel would be in the nature of privileged communications. (1 Green. Ev., sec. 237.)

We think also that the telegram and letter of appellees' agent at Kansas City, incompetent evidence of market values at the times stated therein. (See Western U. Tel. Co. v. Bradford, 14 Texas Ct. Rep., 1006.)

No error appears in the action of the court in overruling appellants' motion to quash the depositions of W. Lake Henry and E. B. Carver. Appellants had full five days notice of the time and place of taking the deposition. The fact that the notary who took them did not do so at the time she stated in the notice given to appellants' counsel that they would be taken, seems wholly immaterial in view of the further fact that one of appellants' agents attended before the notary on the day specified in the notice and no objection appears to have been made to a postponement. It appears that the transcript contains pleas of privilege and certain bills of exception not made the basis of any assignment of

error, and appellees pray that the costs thereof be taxed against appellants. We think the motion therefore should be granted. The rules provide for the elimination of all such useless matter, and we think the party so encumbering the record of a cause on appeal should at least be required to pay the costs relating to the same. Appellants are therefore taxed with the cost of the motion of the redundant matter specified therein. Judgment reversed and cause remanded.

Reversed and remanded.

TEXAS AND PACIFIC RAILWAY COMPANY ET AL. v. A. A. BAILEY.

Decided June 30, 1906.

1.—Connecting Carriers—Delivery of Cattle—Charge.

It being an issue on the trial as to which of two roads was liable for the delay of a shipment of cattle at the junction station, and at what time and place the connecting carrier assumed control of the cattle, it was error, because upon the weight of the evidence, for the court to charge the jury that it was the duty of the initial carrier to deliver said cattle to the connecting carrier at a certain one of two disputed points. The liability of the connecting carrier began whenever and wherever it assumed control of the shipment.

2.—Injury—Presumption Against Last Carrier, When Applicable.

The presumption that injury to a shipment of cattle occurred on the road of the last carrier does not obtain when the shipper accompanies the cattle.

Appeal from the County Court of Mitchell County. Tried below before Hon. W. B. Crockett.

Ed. W. Smith, for appellant T. & P. Ry. Co.

T. S. Miller and *Whitaker & Gibbs,* for appellant M. K. & T. Ry. Co. of Texas.

SPEER, ASSOCIATE JUSTICE.—A. A. Bailey sued the Texas & Pacific Railway Company, the Missouri, Kansas & Texas Railway Company of Texas and the Missouri, Kansas & Texas Railway Company for damages to two shipments of cattle from Colorado, Texas; the first shipment, being of cows and bulls, was made to National Stock Yards, Illinois, and the second, being two cars of calves, was made to Kansas City. Plaintiff recovered judgment against the Texas and Pacific Railway Company for $100 with 6 percent interest from December 16, 1904, the date of the sale of the calves in market, and against the Missouri, Kansas & Texas Railway Company of Texas for $125 at 6 percent interest from the same date, and against the Missouri, Kansas & Texas Railway Company for $125 at 6 percent interest from November 2, 1904. All of the defendants have appealed.

Amongst other things there was an issue on the trial as to which road was liable for a delay after the cattle reached Fort Worth, and prior to the time they were carried out by the connecting carrier, and in this connection the trial court charged the jury as follows: "Gentlemen of the jury, you are instructed that it was the duty of the Texas & Pacific Railway Company to deliver plaintiff's cattle to the Missouri,

Kansas & Texas Railway Company of Texas at North Fort Worth, Texas," and refused the Texas & Pacific Railway Company's requested charge to the effect that if the jury found from the evidence that the defendant Missouri, Kansas & Texas Railway Company of Texas assumed control of appellee's cattle at Fort Worth Stock Yards, then the Texas & Pacific Railway Company would not be liable for any delays occurring after the Missouri, Kansas & Texas Railway Company of Texas had assumed control of the cattle. The charge given, in view of the evidence in the record, is such as to indicate that the court was of the opinion that the delivery by the Texas & Pacific Railway Company should have been made at yards in North Fort Worth, which are shown to be some two or three miles from the Fort Worth Stock Yards, at which latter place the Texas & Pacific contends actual delivery was made to its connecting carrier. This charge, therefore, was on the weight of the evidence, inasmuch as it took from the jury the right to determine the question of where the Texas & Pacific Railway Company should have made delivery to the Missouri, Kansas & Texas Railway Company of Texas. The special charge could with propriety have been given, for, as stated by us in Texas & Pac. Ry. Co. v. Scoggin & Brown, 14 Texas Ct. Rep., 297, if the Missouri, Kansas & Texas Railway Company of Texas assumed control of appellee's cattle at Fort Worth Stock Yards, and agreed to ship them out from that place, then such necessarily would operate as a delivery to it by the Texas & Pacific Railway Company.

The court's charge on the measure of damages is open to the same objection as that in the case of the Missouri, Kansas & Texas Railway Company of Texas et al. v. Williams & Scroggin, this day decided by us.

The court also erred in giving the following special charge requested by the Texas & Pacific Railway Company: "If you find from the evidence that any of plaintiff's cattle in either or both shipments were injured en route to market, but are unable to determine from the evidence which, if either of the carriers caused such injuries, then you are charged that under the law the last carrier handling said cattle is liable for such injuries, if any." This charge, under a similar state of evidence, was condemned by us in the case of the Texas & Pacific Railway Company v. Scoggin & Brown, *supra*. That case had not been decided, however, at the time the present case was tried.

We think appellee's pleadings were sufficient, certainly in the absence of a special exception, to admit proof concerning a decline in the market from Tuesday, December 13, to Friday, December 16, on which latter day the shipment of calves was sold.

The question of excessiveness of the verdict can hardly present itself on another trial as it is presented in this, and therefore need not be discussed.

For the errors indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

D. D. KEELER v. PAULUS MANUFACTURING COMPANY.

Decided June 30, 1906.

1.—Sale by Sample—Implied Warranty—Right of Inspection.

In a sale by sample there is an implied warranty by the seller that the goods will be of the same quality as the sample, and the buyer has the right to inspect the goods upon their arrival notwithstanding the order provided for delivery f. o. b. cars at seller's factory.

2.—Contract—Entirety—Right of Rejection.

Where some of the goods tendered the buyer were not according to sample, and all the goods, those according to sample and those not according to sample, were packed together, the buyer could not be required to separate the good from the bad and accept the good, but had the right to reject the entire shipment.

3.—Pleading—Contract—Countermand—Burden of Proof.

The defendant plead that the order for the goods had been countermanded; the court found as a conclusion of fact that the order was not subject to countermand, but also found that some of the goods were not according to contract and that all the goods were packed together. Held, the burden of proof was upon the plaintiff to show a compliance on its part with the contract; failing in this, it was not entitled to recover on the contract, although the defendant assigned a different reason for refusing to pay for the goods.

Appeal from the County Court of Cooke County. Tried below before Hon. J. H. Garnett, special judge.

Potter & Potter, for appellants.—A sale upon condition that goods of a certain quality and quantity will be delivered is one to which the doctrine of condition precedent applies. If a seller fails to comply with the terms of such agreement the party aggrieved may repudiate the whole contract. 21 Am. & Eng. Enc., p. 635, sec. 6; Cleveland Roller Mills v. Rhodes, 121 U. S., 261; Norrington v. Wright, 115 U. S., 188; Pope v. Porter, 102 N. Y., 368.

Where a vendor ships the goods demanded by the contract and some of the goods are good and comply with the contract and other of the goods are bad and do not comply with the contract, the vendee can not be compelled to receive the entire shipment and select the good from the bad, but has a right to reject the entire shipment. Am. & Eng. Enc., p. 169, notes 2, 3; also p. 173, note 5, citing Osborn v. Grantz, 60 N. Y., 540; Friedman on Sales, sec. 101; Benjamin on Sales, sec. 689 to sec. 690; 21 Am. & Eng. Enc. of Law, p. 635, and authorities cited in note 6; Brantley v. Thomas, 22 Texas, 270; Barton v. Kane, 84 Am. Dec., 730.

Green & Blanton, for appellees.—The parties divided their own contract. The items of five gross of Aerial Bombs at $3.40 per gross, and 5 gross of "20th Century Bombs" at $3.50 per gross, are separate and distinct items from the canes which the appellant complains of only, and the trial judge committed no error in holding the contract a divisible one. The orders were made separately, the first being for canes and ammunition alone for the street fair trade, and the second for the Aerial and 20th Century Bombs and the ammunition therefor and the residue of

the canes. They are separate and distinct items and separate and distinct charges made for each. Smith v. Crosby, 47 Texas, 128; 2 Parsons on Contract, 517. On waiver of right to rescind, we cite: Vogel v. Moore, 84 S. W. Rep., 559; McCormick Harvesting Machine Co. v. Arnold, 76 S. W. Rep., 323; Manley v. Crescent Mfg. Co., 77 S. W. Rep., 489; Skinner v. Kerwin, 77 S. W. Rep., 1011; Dinwiddie v. Nash, 86 S. W. Rep., 518; Yeiser v. Russell, 83 S. W. Rep., 575.

That upon the breach of the contract by the refusal of the appellant to take the goods appellee had its choice of three remedies, to wit:

1. It might have retained the goods and recovered the difference between the contract price and the market price at the time and place of delivery.

2. Or it might have (as it did do) held the property for the appellant or tendered it, and recovered the purchase money at the contract price.

3. Or it might have sold the goods at the best price obtainable at the place of delivery, or if there was no market for the goods there, then in the most accessible market, charging appellant with the reasonable expense of keeping the goods and the sale, and recovered the contract price, less the amount received for the goods at such sale. Waples v. Overaker & Co., 77 Texas, 11; Welden v. Texas Continental Meat Co., 65 Texas, 487; Sour Lake Townsite Co. v. Deutser Furniture Co., 15 Texas Ct. Rep., 631; Field on Damages, sec. 299.

CONNER, CHIEF JUSTICE.—Appellees sued to recover the contract price for certain bombs and firing canes, popular with young America on certain holiday occasions, together with ammunition for the same, that had been theretofore ordered by the firm of which appellant is the surviving member. When tendered in Gainesville, the firm refused to receive the property mentioned on the ground that the order therefor had been countermanded. The court, however, found that the order was not subject to countermand, and rendered judgment for appellee for the price of the bombs and ammunition therefor, but denied a recovery for the price of the canes and cane ammunition, for the reason that the canes were not such as called for by the contract. The court, who filed his conclusions of fact and law, also further found, that when the goods were tendered, "they were contained in three boxes, but that the canes were contained in one box and the ammunition for the canes were contained in one of the other boxes with the Aerial Bombs." Appellee has filed no cross assignment to the finding we have quoted, nor does appellee in like manner contest the court's finding that the canes were defective and did not equal the sample exhibited at the time the order for them was made. This being true, the findings are conclusive, and the court erred in holding that appellant was bound to receive and pay for the bombs.

The sale being by sample, there was an implied warranty on the part of the appellee company that the canes should be equal to the sample, and notwithstanding the order provided for delivery f. o. b. cars at appellee's place of business in New Jersey, appellant had the right upon tender of the goods at Gainesville, to examine the same and to reject them if not in accord with the implied warranty. (Tiedman on Sales,

sec. 114.) And we think, in this case, the right of rejection extended to the whole of the goods tendered. The ammunition for the canes was valueless without effective canes. Canes, bombs and ammunition were all included in one order, the price charged therefore aggregated the sum for which the suit was instituted, and we do not think appellant was required to separate the merchantable articles from those that were not, and to undertake the solution of questions of abatement in cost of drayage, freights, etc., or of prices charged, that would in such case naturally arise. Mr. Tiedman on Sales (sec. 113), in speaking of the duty of acceptance, says: "The buyer is not obliged to accept the goods, unless they have been tendered to him exactly in accordance with the terms of the contract. In other words, the requirements of the law as to delivery, must be observed by the seller, before the buyer is obliged to accept. If, for example, the seller has failed to make the proper delivery, either because he has made it at an unreasonable time of the day, or he has failed to deliver the exact quantity of goods, neither more nor less, nor mixed with other goods, or he has delivered less than the required quantity, or has not delivered in the form called for by the contract of sale; in every such case the buyer may refuse to accept the goods, and relieve himself from all liability by rejecting them and notifying the vendor of the rejection. The buyer is of course not obliged to accept the goods unless he has an opportunity to inspect and examine them." In note 3 to the section stated the author says: "The buyer is not obliged to select the goods he ordered from others shipped in the same package without being ordered." Citing a number of cases not available to us.

It can make no difference, we think, that appellant assigned a right to reject that the court finds did not exist, or that appellant did not make an examination before refusing to receive the goods. In order to entitle it to a recovery, the burden was primarily upon the appellee company to show a compliance on its part with the contract of sale and a wrongful breach by appellant. This included a necessity for proof that the goods tendered were substantially such as ordered, and under the court's findings it is clear that there was a substantial failure in this respect. It is also clear that appellant had reason for believing that the canes ordered, were practically worthless, and that had examination at the time of the tender been made, a refusal to accept would certainly have followed.

We accordingly approve and adopt the court's findings of fact, but conclude, as a matter of law arising thereon, that the judgment should have been for appellant. The judgment below, is therefore reversed, and here rendered in appellant's favor.

Reversed and rendered.

HIRAM SMITH v. W. P. FLORENCE.

Decided June 30, 1906.

Purchase of School Land—Actual Settlement.

In a contest between applicants to purchase school land from the State the evidence for the defendant as to actual settlement on the land was, in

substance, that on the evening of September 22, 1902, he drove upon the land with his wagon and buggy, in which were contained all his household goods and means of living; that on the next day he drove to the county seat in his buggy, leaving his wagon and household goods upon the land, and made application to purchase the land; that he used his covered wagon as his place of abode until he constructed a house and made other substantial improvements in November following; that the lumber, wire, posts and stock feed were put upon the land in October; that he moved upon the land for the purpose of making it his home and had continuously thereafter resided on the land; that he was a widower without family. The plaintiff settled upon the land and made application to purchase the same two years later. Held, that the evidence of actual settlement by defendant was sufficient to support a verdict for him.

Appeal from the District Court of Lubbock County. Tried below before Hon. L. S. Kinder.

L. W. Dalton, W. D. Benson and *John R. McGee,* for appellant.—Appellee having made no settlement upon the land in controversy prior to the time of making his applications to purchase the same, his applications, obligations and affidavits attached thereto, were absolute nullities and he acquired no rights whatever to the land in question under such applications to purchase. Sayles Civ. Statutes, art. 4218f; Acts first called session Legislature, 1900, pp. 32, 33; Acts of 1901, regular session, p. 254; Acts of 1901, regular session, secs. 3, 7, pp. 294-6; Busk v. Lowrie, 86 Texas, 128; Cordill v. Moore, 17 Texas Civ. App., 219; Lee v. Green, 24 Texas Civ. App., 110; Thomson Bros. v. Hubbard, 5 Texas Ct. Rep., 299; Metzler v. Johnson, 1 Texas Civ. App., 139; Eastin v. Furgeson, 4 Texas Civ. App., 646; Willoughby v. Townsend, 93 Texas, 80; Martin v. Marr, 2 Texas Ct. Rep., 396; Briggs v. Key, 6 Texas Ct. Rep., 92; Lewis v. Scharbauer, 8 Texas Ct. Rep., 268; Jones v. Bourbonnais, 60 S. W. Rep., 986; Borchers v. Mead, 17 Texas Civ. App., 35; Renner v. Petterson, 51 S. W. Rep., 867.

Wm. J. Berne, for appellee.

STEPHENS, ASSOCIATE JUSTICE.—This suit was brought by appellant to recover from appellee two sections of school land in Lubbock County, which had been awarded to appellee on applications made about two years prior to those of appellant. The case was submitted on special issues, and the jury found: (1) That appellee was an actual settler at the date of his purchase from the State (—— day of September, 1902), and that he had thereafter continuously resided on the land, making permanent improvements thereon of the value of $300; (2) that appellant was an actual settler at the date of his application, and had also continued to reside on the land.

Appellant strenuously controverts the sufficiency of the evidence to warrant the finding that appellee was an actual settler at the date of his purchase, making the following quotation from his testimony to sustain the contention: "My name is W. P. Florence and I am the defendant in this case. I drove on section No. 113 of the land in controversy with my wagon to which was trailed a buggy, on the 22d day of September, A. D. 1902; the wagon was full of household goods consisting of bed-

ding, two mattresses, eight or ten quilts, four pillows, a supply of slips for each pillow, kitchen and cooking vessels, grips and boxes containing clothing, two carpets, lamp and oil, window curtains, some provisions and a lot of books—about 200 volumes, and other articles; the wagon had bows and a sheet stretched over the bows in the usual way; I drove on this section of land in the evening with the wagon, buggy and household goods as stated, ate my supper there in the wagon and slept there in the wagon that night; I had some provisions cooked and ate a cold supper; the next morning I ate a cold breakfast of the same provisions; I have no recollection of making a fire there the next morning; this wagon and buggy was standing on the section No. 113 of the land in controversy, and this is what I did in making settlement on the same; the next morning, September 23, 1902, I hitched my horses to the buggy, leaving the said wagon and household goods there on the land, and leaving the household goods in the wagon the same as they were when driven on the land the evening before, drove into the town of Lubbock and made my application to purchase the land in controversy in this suit, on that day, the 23d day of September, A. D. 1902; when I left my wagon there that morning I left everything that I had there in the wagon; I left nothing outside of the wagon on the ground and had nothing else on the land, at that time; I never did have a tent on the land and never had anything on the land but my wagon with the household goods in it as stated, up to the time that I built my house on this section of land in November following, except the lumber, wire, feed and posts that I put there in the latter part of October, 1902."

The evidence further disclosed that appellee was an unmarried man (though he had once been married) and had no family; that he went on the land for the purpose of making it his home, taking with him all his household goods and means of living, and treating the covered wagon, which remained stationary, as his place of abode until he had constructed a house and made other substantial improvements, which were made, however, after the award to him, but before appellant had filed his applications; and that appellee had no other home or place of residence.

We are thus again confronted with the difficulty, so often encountered heretofore, of determining the sufficiency of the proof offered of actual settlement on the part of a purchaser or an intending purchaser of school lands. (See Borchers v. Mead, 43 S. W. Rep., 122, and several other cases. The definitions by which the proof in a given case is to be tested are as follows: "Actual settlement means actual residence." (Mosely v. Torrence (Calif.), 12 Pac. Rep., 430.) The same court, in Gavitt v. Mohr, 10 Pac. Rep., 337, used this language: "An actual settler upon land belonging to the state is one who establishes himself upon the land, or fixes his residence upon it, to take possession, for his exclusive occupancy and use, with a view to acquire title to it by purchase from the State." In Bratton v. Cross, 22 Kan., 673, this language was used: "To settle upon land we think means to fix one's place of residence thereon; and a settler upon land is one who resides thereon. This is in accordance with all the definitions of the words settle, settler and settlement, when applied to settlements upon land," citing, among other cases, that of Burleson v. Durham, 46 Texas, 152, where the question is discussed at length. Read in the light of these

definitions, can we say that the facts of this case did not warrant the inference that appellee established himself, or fixed his residence on the land in controversy when he went there and stopped his wagon, prepared and intending to then and thereafter live and remain permanently? We think not. There must always be a time when residence, or the state of being a resident, begins, and the use of a covered wagon as a habitation until something better can be provided is not conclusive evidence that one so living is a wayfarer and not a settler.

It is not easy to distinguish this case from the unreported case of Hawley v. Rodgers, decided by us November 26, 1904, in which we adopted the conclusions of the trial court and in which a writ of error was refused. The principal difference between that case and this is to be found in the fact that Rodgers, after going on the land in his wagon, took the wagon bed off, slept a part of one night in it, and left on the running gear of his wagon early the next morning, after building a brush pen around the wagon bed to protect the provisions and other things he had placed in it. He was a married man, had his wife with him, and cooked and ate one or two meals while there.

The other findings were also warranted by the evidence.

The judgment is therefore affirmed.

Affirmed.

GEORGE HEFFINGTON ET AL. v. JACKSON & NORTON.

Decided June 30, 1906.

Contract by Minor—Voidable—Necessaries.

In a suit against a minor and his mother upon a promissory note executed by the minor alone for the balance due for a buggy and harness sold by the plaintiffs to said minor, it appeared from the evidence that the plaintiffs knew that the purchaser was a minor; that he was living with his mother on her farm; that he then had a buggy; that he was not engaged in any business demanding the use of a buggy; that they would have to look to him for the payment of the note, and that his mother would not pay it. Held, there being no evidence of fraud on the part of said minor, nor that said buggy was a necessary, the minor had the right to avoid said contract, and upon tendering back the buggy and harness received from plaintiffs to have judgment against them for the money and property paid by him to them.

Appeal from the County Court of Dallas County. Tried below before Hon. Hiram T. Liveley.

Ed. T. Harrison and *Graham B. Smedley,* for appellants.

BOOKHOUT, ASSOCIATE JUSTICE.—This suit was instituted in the Justice Court of Dallas County by plaintiffs Jackson & Norton against George Heffington, a minor, and Mrs. S. A. Heffington, his mother, upon a note executed by the said George Heffington for $61.25, in part payment for a buggy and harness sold by plaintiffs to the said George Heffington for the sum of $103.75. From a judgment in favor of plaintiffs for $76.55 defendants appealed to the County Court. Plaintiffs sought to recover against George Heffington upon the ground that the buggy and harness sold him were necessaries, and against Mrs.

S. A. Heffington upon the same ground, and that she failed to supply him with the same, and upon the further ground that she constituted the said George Heffington her agent to purchase said buggy and harness, and after the purchase thereof ratified his act. Mrs. S. A. Heffington answered with a plea of general demurrer and general denial. George Heffington plead infancy in avoidance of the payment of said note, tendered to plaintiffs the buggy and harness for which said note was executed in part payment, and prayed judgment against plaintiffs for the following sums: $25 money paid plaintiffs on said buggy and harness; $25, the value of a second hand buggy traded plaintiffs in part payment for the buggy and harness purchased from them; and for the cancellation of said note of $61.25. From a judgment of the County Court in favor of plaintiffs for $61.25 against both defendants and against George Heffington on his counterclaim, defendants appealed.

J. A. Jackson, one of the plaintiffs, testified in behalf of plaintiffs as follows: "My name is J. A. Jackson. I live at Renner, and am one of the plaintiffs in this case. I know George Heffington and his mother, Mrs. S. A. Heffington. I sold George Heffington on or about January 20, 1904, the buggy and harness for the sum of $103.75, being $90 for the buggy and $13.75 for the harness. He gave me this note for $61.25 and a second hand buggy and twenty-five dollars in money. I sold him the buggy at Renner, Texas, some time in January, 1904, and about a month after he paid me $25 in money, delivered the old buggy to me and executed this note. This was at Renner, at my place of business. The first conversation I remember having had with George about selling him the buggy was one day at a blacksmith shop at Renner. He had his old buggy there to have it repaired, and I proposed to sell him a new buggy and take his old one as part payment, I asked how much cash he could pay. He said he thought he could get thirty dollars from his mother and would pay that much, and I told him if he could pay that much and put in his old buggy, I would sell him the new one. We agreed on this and set a day to go to Dallas to select the buggy. I have known George Heffington all his life, and at the time I sold him the buggy I knew he was not of age. He made no representations to me about his age, because I knew he was a minor. I knew he was buying the buggy for himself and for his own use. I did not understand that he was acting for his mother, and knew that he was not buying the buggy for her, but for himself. I sold the buggy to him and not to his mother, and was expecting him to pay for it. I did understand that he was to get thirty dollars from his mother to pay on the buggy, but I was looking to him to pay for the buggy and not to his mother. He told me at the time he bought the buggy that his mother would not pay for it, but that she knew he wanted it and he thought he could get $25 from her to pay on it. I knew George was living at home with his mother at the time he bought the buggy."

Defendant George Heffington is a minor and was a minor when he executed the note sued on. Such being the case he could avoid the note. A recognized authority, speaking of the right of an infant to avoid his contracts, states the rule thus: "The right of an infant to avoid his contracts is one conferred by law for his protection against his own

improvidence and the designs of others; and though its exercise is not infrequently the occasion of injury to those who have in good faith dealt with him, this is a consequence which they might have avoided by declining to enter into the contract. It is the policy of the law to discourage adults from contracting with infants, and the former cannot complain, if, as a consequence of their violation of this rule of conduct, they are injured by the exercise of the right with which the law has purposely invested the latter, nor charge that the infant, in exercising the right, is guilty of fraud." (16 Am. & Eng. Enc. Law, p. 287.) The principle announced is recognized in this State in Bullock v. Sprowles, 93 Texas, 188. However, there are exceptions to the rule, as where the contract is for necessaries for the infant, Parsons v. Keys, 43 Texas, 559, or, where the infant has been guilty of some fraud in creating the debt. In this case there is no contention that the minor was guilty of fraud. The plaintiffs had known him from infancy, knew that he was a minor when they solicited him to purchase the buggy for which the note was executed, knew that he was living with his mother on her farm; knew that he then had a buggy, knew that he was not engaged in any business demanding the use of a buggy, and knew that his mother would not pay for it.

The question arises, was the buggy a necessary to a person situated as was George Heffington? He was not engaged in any business requiring the use of a buggy, nor was he attending school, which made it necessary for him to ride to and from school. It was held in the case of House v. Alexander, 105 Ind., 109, that a horse purchased by an infant who is engaged in farming is not a necessary. Horses, saddles, bridles, pistols, liquors, fiddles and chronometers have been generally excluded as necessaries. (McKanna v. Merry, 61 Ill., 177.)

The case of Howard v. Simpkins, 70 Ga., 322, is cited by the appellant as holding that a buggy is not a necessary. The case is not accessible to us, and hence, we do not feel authorized to cite it. The facts do not show wherein a buggy was necessary for the defendant George Heffington. He had a buggy when he was solicited by Jackson to purchase the one for which the note was executed. The appellees sold the buggy to George Heffington and not to his mother, knowing that Mrs. Heffington did not intend to pay for it. They knew that George lived with his mother on her farm. They knew he was a minor and relied on him to pay the note given for the balance due on the vehicle. The case was tried by the court below without a jury and in rendering judgment for plaintiffs there was error. The judgment will be reversed and under the statute it becomes our duty to render such judgment as the trial court should have rendered. Judgment will be here rendered for appellants, cancelling the note sued on, and in favor of George Heffington for $42.50, the amount paid by him to appellees on the buggy, with interest at six percent from July 15, 1905, the date of tendering back the buggy by George Heffington in the Justice's Court, and that upon his returning to the appellees, or tendering to them said buggy, and harness, execution may issue for said amount. (Price v. Furman, 27 Vt., 268, 65 Am. Dec., 194.)

Reversed and rendered.

OCTOBER, 1906.

A. B. MEEK v. HOUSTON ICE AND BREWING COMPANY, GARNISHEE.

Decided October 6, 1906.

Court—Jurisdiction—Amount of Demand—Nonresident — Citation — Garnishment.

Plaintiff brought suit in the District Court against a nonresident defendant for the sum of $7.75 alleged to be due on contract, and for $2,000 damages for breach for said contract; no service was had on defendant; a writ of garnishment was sued out, the application and affidavit averring that the defendant was indebted to plaintiff in the sum of $7.75 and a bond was executed in the sum of $15.50. The garnishee moved to abate the suit for want of jurisdiction in the District Court, and answered admitting an indebtedness to defendant in the sum of $561.90. Held, the motion to abate was properly sustained.

Appeal from the District Court of Harris County. Tried below before Hon. C. E. Ashe.

J. V. Meek and *W. H. Haynes,* for appellant.—In an action on a claim—part of which is liquidated and part unliquidated—plaintiff is entitled to writ of garnishment, although the portion of the claim which is liquidated, standing alone and separate from the balance of the claim, would be for an amount not within the jurisdiction of the court in which the suit is pending. Sayles' Civ. Stats., art. 217 et seq.; Goodman v. Henley & Gabbert, 80 Texas, 499; Dwyer v. Testard, 65 Texas, 432; Evans v. Lawson, 64 Texas, 199; Stewart v. Heidenheimer, 55 Texas, 648.

Baker, Botts, Parker & Garwood, for garnishee.

PLEASANTS, ASSOCIATE JUSTICE.—Appellant filed suit in a District Court of Harris County against The Meek Company, a foreign corporation having its domicile in the State of Ohio, on a claim for $2,007.75. Of the amount claimed $7.75 was alleged to be due appellant on a contract of employment and the remaining $2,000 was claimed as unliquidated damages caused by the breach by the defendant of said contract. The petition alleges that the defendant is a foreign corporation and contains no allegations that it has a representative in this State upon whom service of citation could be had, and the record fails to show service of any kind upon the defendant.

At the time this suit was filed appellant applied for and obtained a writ of garnishment against the appellee. The application and affidavit in garnishment allege that the original defendant was indebted to appellant in the sum of $7.75 and contain all other necessary allegations to authorize the issuance of the writ, and was accompanied by a bond executed in accordance with the statute for the sum of $15.50. The writ of garnishment was issued and served upon appellee on April 7, 1905.

At the succeeding June term of the court appellee filed a motion to abate the writ of garnishment on the ground that the proceeding showed upon its face that the court was without jurisdiction to hear and determine the matters in controversy, and subject to this motion filed an answer admitting that it was indebted to the defendant in the sum of $561.90.

The motion to abate was sustained by the trial court and from a judgment dismissing the proceedings this appeal is presented.

Under an appropriate assignment of error the appellant presents the following proposition upon which he contends the judgment of the trial court should be reversed:

"In a suit on a liquidated demand joined with an unliquidated demand, against a nonresident defendant, and garnishment against resident garnishee, and garnishee answers that it is indebted to defendant, the amount of such indebtedness is, as it were, brought into and is in the custody of the court, and the court has the right to adjudicate the entire cause of action, and apply the amount that garnishee is indebted to defendant to the payment of such judgment as plaintiff is entitled to recover against defendant, whether such judgment is on the liquidated or unliquidated portion of plaintiff's claim. Jurisdiction having once attached, the court retains jurisdiction for all purposes."

It may be conceded as a general rule that when a plaintiff brings a suit upon two or more causes of action which are properly joined, and the sum of the claims is an amount within the jurisdiction of the court, he may, if otherwise entitled thereto, obtain a writ of garnishment upon any one of his claims or causes of action notwithstanding the fact that such claim is for an amount below the jurisdiction of the court in which the suit is brought. This rule, however, is necessarily limited to cases in which the court has potential jurisdiction of the suit, and such jurisdiction can only be acquired by proceedings *in rem* which seek to bring the subject matter of the suit, of value sufficient to give jurisdiction, into court, or by service upon the defendant sufficient to give the court jurisdiction of his person.

This record does not disclose such a case, but on the contrary it appears from the face of the proceedings that the only portion of the claim against the defendant upon which an attachment or garnishment could issue is the $7.75 claimed as debt, the remainder of the claim being for unliquidated damages, and that the defendant is beyond the jurisdiction of the court and no service can be had which would bring it before the court so that personal judgment could be rendered against it.

The garnishment proceedings only attached a sufficient amount of the indebtedness due the defendant by the garnishee to satisfy the claim for $7.75, and that amount being below the jurisdiction of the court the proceedings must fall.

We think the judgment of the court below should be affirmed and it is so ordered.

Affirmed.

Writ of error refused.

T. S. TEAGUE v. XAVIER RYAN.

Decided October 6, 1906.

Trial of the Right of Property—Judgment—Value of Use of Property.

In a trial of the right of property when the judgment is against the claimant and provides for the return by him of the property in controversy and for payment of the reasonable value of the use of the property while in his possession, the judgment should fix the amount of such use, rent or hire.

Appeal from the District Court of Hardin County. Tried below before Hon. L. B. Hightower.

Robt. E. Breeding, for appellant.—The court erred in rendering judgment herein for appellee for "the reasonable value of the rent, use and hire of said property," without fixing the amount of same. Fort Worth Pub. Co. v. Hitson, 80 Texas, 233; Martin v. Hartnett, 24 S. W. Rep., 963.

Xavier Ryan, for appellee.—Judgment for the value of the property alone without providing that its return satisfies the judgment is not erroneous as the right to return exists independent of the judgment. Muenster v. Tremont Nat. Bank, 92 Texas, 426.

GILL, CHIEF JUSTICE.—Xavier Ryan having had an execution levied upon certain personalty as the property of one Zierath (the defendant in the judgment out of which the execution issued), T. S. Teague filed a claimant's oath and bond under the statute governing proceedings in trial of right of property. Others intervened in the proceeding setting up like claim in behalf of themselves, but as their interventions were dismissed and they have not appealed no further reference to their claim is necessary.

The court tried the cause upon issues made up between Teague and Ryan and rendered judgment in favor of Ryan for $1,600, the adjudged value of the property, six percent interest on that amount from the date of the claim and ten percent on that amount as damages. The judgment further expressly provided that the officer should not accept the returned property in satisfaction of the judgment unless the tender was accompanied by the payment of costs, the damages adjudged and a sum equal to the reasonable value of the rent and hire of the property during the time it had been in the hands of the claimant. The amount of this item was not adjudged.

The claimant has appealed and offers several assignments of error for our determination. One of these is to the effect that the court erred in failing to adjudge the amount of the rent and hire necessary to be tendered in case appellant desired to return the property unimpaired, together with damages and costs in satisfaction of the judgment as the statute provided he might do. We were first inclined to think the judgment might be affirmed notwithstanding this assignment, on the theory that as the amount of the rent and hire had not been adjudged, that part of the judgment could be treated as a nullity to the appellee's loss. We were also impressed with the force of the suggestion

that the judgment recited all that the statute required it to recite. That the statute did not require the determination by the judge of the value of the rent and hire but passed that to the officer to be determined when the property should be tendered, just as he must determine for himself whether the property when tendered is in as good condition as when claimed and taken. But to our minds the question is expressly decided in Fort Worth Pub. Co. v. Hitson & Reed, 80 Texas, 233, wherein Chief Justice Gaines said, speaking to the same point:

"The judgment should also have fixed the value of the use of the property in controversy. . . . The court should determine the value of the use of the property . . . to enable the claimant if he should wish to return the property in satisfaction of the judgment as provided by article 4845 (of the statute of 1879) to know what amount he is required to pay for the use of such property up to the date of the judgment."

The point is well taken and requires that the judgment be reversed and the cause remanded, and it is so ordered. The other assignments are without merit.

Reversed and remanded.

J. H. HAM v. HAYWARD LUMBER COMPANY.

Decided October 8, 1906.

Personal Injury—Improper Tools—Negligence of Master—Peremptory Charge.

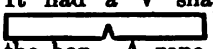
In a suit for personal injuries where there was evidence tending to show that the tool by which plaintiff was injured was not a safe tool or apparatus to use for the purpose for which it was provided by the master, that it was insecure and dangerous for that purpose, that complaint of these facts had been made to the representative of the master without effect, that the accident was caused by the improper construction of the tool and that the accident would not have occurred if a proper tool had been used, it was reversible error for the court to instruct a verdict for the defendant, although the evidence for the defendant strongly controverted the foregoing facts.

Appeal from the District Court of Nacogdoches County. Tried below before the Hon. James I. Perkins.

T. B. Lewis and *Mims & Strong,* for appellant.

Harry P. Lawther and *S. M. Adams,* for appellee.

REESE, ASSOCIATE JUSTICE.—J. H. Ham, employed by the Hayward Lumber Company as a common laborer, was engaged in assisting in the erection of a smoke-stack for his employer. His business was to send up from the foot of the smoke-stack sections of the stack, as they were needed, to the men at the top, to be used in building up the stack. One Mullins was engaged in the work at the top of the stack. His business was to assist in "bucking the rivets," that is, to put the bolts and rivets through the holes in the sections of the stack and then to hold a piece of iron, called a "dolly-bar," against the rivets on the

outside, while men on the inside riveted them with hammers. The dolly-bar in use for the work was a piece of iron or steel about 3½ inches wide and about 18 inches long and weighed 40 or 50 pounds. It had a V shaped cut in it about the middle, shaped like this  ; which extended about 2-3 of the way through the bar. A rope was tied around the bar by a slip knot, at this cut, which passed through a hook higher up and came down and was tied in the noose or knot around the dolly-bar. This held the dolly-bar in place opposite the rivets against which it was pressed and held by the workman engaged in that work, in the present case, Mullins, while the rivets were fastened with hammers by the men on the inside of the stack. The dolly-bar thus suspended would be above and over the place where Ham was required to work, on the ground, at the foot of the stack. At the time of the accident hereinafter referred to the smoke-stack had been built up about 30 or 40 feet high. The iron used in "bucking the rivets" was not a regular dolly-bar and was simply a piece of iron or steel picked up and used for that purpose. There is such an instrument as a dolly-bar specially made for that purpose, which has a ring in it about where the cut was in this bar in which the rope is fastened that suspends the bar when in use. The entire apparatus used upon this occasion consisted of the bar of iron, the rope tied around it and the overhead hook upon which the rope was hung.

On the 15th day of October, 1904, while the men employed in erecting the smoke-stack were engaged in the work, J. H. Ham being on the ground, at the foot of the stack, and Mullins at the top of and outside of the stack in a "chair or buggy" placed there for him to sit in while holding the dolly-bar against the rivets, the dolly-bar in some way was loosened from the rope and fell, rebounding and striking Ham on the legs and injuring him. This suit is brought by said Ham, appellant, against the Hayward Lumber Company, appellee, to recover damages for such injuries. It is alleged that the dolly-bar or piece of iron used as such was not a proper tool for the purpose, but was insecure and dangerous to the workmen situated as appellant was; that appellee was negligent in furnishing such a tool and apparatus to work with, and that the falling of the dolly-bar and appellant's consequent injury were proximately caused by the improper and insecure character of the dolly-bar.

Appellee pleaded general denial, contributory negligence and assumed risk, and also negligence of the fellow servants of appellant.

Upon the evidence the court instructed a verdict for appellee, and from the judgment for appellee this appeal is presented. The action of the court in directing a verdict is assigned as error.

The principle of law that the master is required to use ordinary care to furnish for his servants a safe place in which to work and safe tools to work with, and is responsible for the proximate consequences of his failure to do so, is not controverted by appellee, but it is claimed that there was no evidence introduced to authorize the submission of the case to the jury upon the issue that the accident by which appellant was injured was caused by the improper structure of the iron used as a dolly-bar, or the improper and insecure condition of the apparatus being used.

There was evidence tending to show that this dolly-bar was not a safe tool or apparatus to use for the purpose, that it was insecure and dangerous and that complaint had been made to the representative of the master of these facts without effect, other than a direction to continue to use it. There was also evidence which, if true, tended to show that the accident was caused by the improper and insecure construction of the dolly-bar as a tool or implement for the purpose for which it was being used, and would not have occurred if a proper tool had been used. It is true that all of this evidence was strongly controverted by appellee, but we are of the opinion that the evidence introduced on the part of appellant was sufficient to require the submission of the issue to the jury upon proper instructions, and that the court committed error in instructing a verdict for appellee. It is not necessary in this opinion to further discuss the evidence. (Wood's Master and Servant, sec. 405.)

For the error indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

C. B. PINKSTON ET AL. v. G. W. BOYD.

Decided October 10, 1906.

1.—Defective Brief—Fundamental Error.

The Appellate Court may reverse a judgment upon errors assigned, though not presented in compliance with the rules governing briefs, especially where the ruling complained of partakes of the nature of fundamental error.

2.—Charge—Ignoring Issue.

A charge which, in directing a verdict on the finding of certain enumerated facts, ignores a theory of the case supported by pleading and evidence requiring a contrary finding, presents error which necessitates reversal.

Appeal from the District Court of Henderson County. Tried below before Hon. B. H. Gardner.

Faulk & Faulk, for appellants.

J. W. Donaldson and *Richard B. Semple,* for appellee.

KEY, ASSOCIATE JUSTICE.—The controversy in this case arose out of a contract for the sale of a tract of land, by which contract each party deposited $150 with the First National Bank as a forfeit. The sale was not consummated and, the parties failing to agree as to the disposition of the money, the bank brought this suit to have the matter judicially determined and a judgment rendered which would protect it. A judgment was rendered awarding the forfeit money to the contracting purchaser, G. W. Boyd, and Pinkston and Johnson, the contracting sellers, have appealed.

Appellee objects to a consideration of appellants' brief because all of the assignments of error, fourteen in number, are grouped together. It must be conceded that appellant's brief in the respect referred to

does not conform to prescribed rules. However, in International & G. N. Ry. Co. v. Anderson, 82 Texas, 521, where the appellant's brief was subject to the same objection, the Supreme Court, while conceding the irregularity of the brief, passed upon the questions sought to be presented and reversed the case. In view of that decision and the fact that the error for which this case is reversed is so vital as perhaps to constitute fundamental error, we have concluded to consider and decide at least one of the questions suggested in appellants' brief.

On March 14, 1905, the contending parties entered into a written contract by which appellants agreed to sell to appellee 300 acres of land in Henderson County, Texas, for $3,300, $1,300 of which was to be cash, and for the remainder they were to take a house and lot situated in Tennessee. Appellants agreed to furnish a good and sufficient title to the land and reserved the right to examine the house and lot, and, if not satisfied with them, or if appellee's agent had sold them, the trade was to be cancelled. The contract allowed 60 days for the consummation of the trade, and stipulated that if either party failed or refused to carry out the contract, the other party should be entitled to the $300 deposited in the bank. Appellants pleaded performance of the contract by them, and alleged that appellee had failed and refused to comply with the contract, and prayed for judgment for the $300. Appellee in his answer admitted the execution of the written contract, but alleged that it did not embrace the entire contract between the parties, and that by mistake there was omitted from it a stipulation to the effect that appellants were to furnish appellee with an abstract showing a good and perfect title to the 300 acres of land. This averment was traversed by a supplemental pleading filed by appellants.

The court instructed the jury that if the omission alleged by appellee was, in fact, part of the contract agreed upon, and was by mutual mistake omitted from the written contract, to find a verdict for appellee for the forfeit money. This charge was erroneous, because there was testimony tending to show that before the expiration of the sixty days allowed by the contract for the consummation of the sale appellee repudiated the contract. If the alleged omission should be considered as part of the contract, still appellants were entitled to sixty days from its date in which to comply with that as well as other provisions of the contract; and if before the expiration of the time referred to appellee repudiated the contract, then he was not entitled to recover. The charge referred to ignored and, in effect, eliminated this vital feature of the case, and for this grave error the judgment will be reversed and the cause remanded.

Reversed and remanded.

NANCY J. COWAN v. HOLT BRETT ET AL.

Decided October 10, 1906.

1.—Judgment—Fraud—Special Verdict.

A finding that the court was led to render a decree of partition by representations that certain part owners had no interest in the land was sufficient to establish the procurement of such decree by fraud.

2.—Judgment—Minors—Service by Publication.

Minors cited by publication, not appearing except by attorney appointed by the court, where no statement of facts was filed as required by statute, and they can show a good defense, are entitled to have the judgment set aside without relying on fraud in its procurement.

3.—Requested Charge.

Failure to instruct on a point is ground for reversal where request was made for a charge covering that question only, not where other propositions, some of them not correct, were embraced in the requested instruction.

4.—Advancement—Deed of Gift.

A deed to a child in consideration of love and affection is not necessarily to be taken as an advancement, and one upon valuable consideration could not be so taken.

5.—Married Woman—Partition.

A married woman may make verbal partition of her real estate, and her deed, though not acknowledged, may be effective therefor.

6.—New Trial—Juror Kin to Attorney.

The fact that one of the jury was kin to appellee's attorney and the latter interested in the controversy by a contingent fee, was not ground for new trial unless such contingent interest was shown to be unknown both to the appellant and her attorney when they accepted such juror with knowledge of his kinship to the attorney.

Appeal from the District Court of Fannin County. Tried below before Hon. Ben. H. Denton.

Richard B. Semple, for appellant.—When a judgment is rendered against a minor, regular on its face in all respects, he can. after his majority, have it set aside only by showing that fraud or collusion was used in procuring its rendition or that he had a good defense which was not presented at a former trial. Johnson v. Johnson, 12 Texas Ct. Rep., 416; Cannon v. Hemphill. 7 Texas, 201; Garcia v. Illg, 14 Texas Civ. App., 485; Walker v. Renfro, 26 Texas, 144; Grigsby v. Peak, 68 Texas, 240; Wright v. Bearrow, 13 Texas Civ. App., 151.

Where a mother owning land jointly with a child conveys to said child her interest in said property without a valuable consideration, and the evidence fails to disclose the purpose of the mother in making said conveyance, the law presumes such conveyance to be a gift from the mother to the child by way of advancement. Lott v. Kaiser, 61 Texas, 665; Williams v. Emberson, 22 Texas Civ. App., 527.

The court erred in charging the jury that if the conveyance by Nancy Price to Carrie Brett was a gift by Nancy Price to Carrie Brett and intended by her to be in full of, or in lieu of what Carrie Brett might inherit from Nancy Price at her death as an heir to the land (other than said 86 acres), then such consideration would be an advancement, but if the real consideration was a release of Carrie Brett's interest in other lands as stated in the deed, then it would not be an advancement. Williams v. Emberson, 22 Texas Civ. App., 527; Cross v. Evarts, 28 Texas, 525; Cazassa v. Cazassa, 36 Am. St. Rep., 112; Lynch v. Ortlieb, 70 Texas, 730; Tiedman on Sales, sec. 11; Hale v. Hollon, 90 Texas, 427; Jenkins v. Adcock, 5 Texas Civ. App., 466.

In a suit for land where the son-in-law of one of the jurors is a party

in interest and is to receive a part of the land sued for, if recovered, his father-in-law is under the statute disqualified from serving as a juror to try said cause. Texas & Pac. Ry. v. Elliott, 22 Texas Civ. App., 31; Houston & T. C. Ry. v. Terrell, 69 Texas, 650; Schultze v. McLeary, 73 Texas, 92.

McGrady & McMahon, for appellees.—The facts showing that plaintiffs had a good defense to the former suit, they being minors, cited by publication and not appearing and there being no innocent purchaser, they were entitled to have the former decree set aside. Rev. Stats., arts. 1375-1376; Snow v. Hawpe, 22 Texas, 168; Wallis v. Stuart, 92 Texas, 568; Crouch v. Crouch, 70 S. W. Rep., 595.

The jury having found that the plaintiffs in the former suit falsely represented the facts to the court and thereby induced the court to enter a decree depriving the minors of their property which the court would not have done but for such false representations, is conclusive fraud in law, and entitles the minors to have such decree set aside, no innocent rights having intervened. Mitchell v. Zimmerman, 4 Texas, 75; Mussina v. Moore, 13 Texas, 7; Gross v. McClaran, 8 Texas, 341; Cundiff v. Teague, 46 Texas, 475.

The minors being nonresidents, cited by publication and not appearing, it was duty of plaintiffs in that suit to have made and filed a statement of the testimony, and having failed, entitles the minors to a new trial, as they have no right of appeal, at least in absence of a showing that their rights were made known to the court. Rev. Stats., art. 1346; Perry v. Warner, 40 S. W. Rep., 170; Taliaferro v. Carter, 74 Texas, 637; Thomas v. Jones, 41 Texas, 265; Byrnes v. Sampson, 74 Texas, 79; Yturri v. McLeod, 26 Texas, 84.

Alexander, the juror, did not know that Meade had a contingent interest in the case. Appellant willingly accepted the juror knowing of the relationship, and, so far as this court knows, also knew of Meade's contingent interest. Meade was not a party to the suit, therefore if Alexander was related to him it would not disqualify him. Patton v. Collier, 90 Texas, 115; Winston v. Masterson, 87 Texas, 200. The failure of appellant to make the record show what the full facts were, as disclosed on motion for new trial, precludes this court from considering the question. De Garcia v. San Antonio & A. P. Ry., 77 S. W. Rep., 275; Graves v. George, 54 S. W. Rep., 262; Bailey v. Trammell, 27 Texas, 317; McDowell v. Fowler, 80 Texas, 587; Lester v. State, 2 Texas Crim. App., 446.

KEY, ASSOCIATE JUSTICE.—Holt and Frank Brett brought this suit to set aside a former judgment upon the grounds (1) of fraud in procuring it; (2) a meritorious defense which was not presented; and (3) failure to file statement of testimony in the former suit, as required by statute, the defendants being served by publication. It was also alleged that the plaintiffs in this suit, who were defendants in the former suit, were minors at the time the former judgment was rendered. It was asked that the former judgment be set aside and a decree of partition entered dividing the lands referred to.

The case was sumbitted to a jury upon special issues, the answers to

which, together with certain findings of fact by the trial judge, were made the basis of a decree setting aside the former judgment and decrees, and awarding to the plaintiffs a 5-6 undivided interest in one of the tracts of land, and a 3-24 interest in the other tract. Mrs. Nancy J. Cowan, one of the defendants, has appealed. It was held that she had no interest in the first tract of land, but the judgment awards to her 14-24 of the other tract.

The first assignment of error complains of the action of the court in refusing to render judgment for Mrs. Cowan upon her motion to that effect, for the alleged reason that the jury found that there was no fraud or collusion in the procurement of the former judgment. The first issue submitted to the jury was whether or not the judgment referred to was procured by fraud or collusion on the part of the plaintiffs in that suit. The jury answered: "As to the court there was no fraud, but N. J. Cowan and others did make false statements in their pleadings." But in response to the nineteenth and twentieth issues submitted the jury answered that the plaintiffs in the former suit represented to the court that N. J. Cowan owned one-half of the 86 acres in controversy, for the purpose of depriving Holt Brett and Frank Brett of their interest in said 86 acres, and that Ed. Price as agent, so represented, and that the representations referred to caused the court to enter a decree which would not have been entered but for such representations. The uncontroverted testimony shows that at the time referred to Holt and Frank Brett owned 5-6 of the 86 acre tract of land. Therefore the representations which the jury found were made to the court on the former trial were false, and as they resulted in misleading the court and causing it to enter a decree depriving the Bretts of their interest in the land, such representations constituted a fraud. Hence we hold that the record does not sustain appellant's contention that the jury found that the former judgment was not procured by fraud. Furthermore, the plaintiffs in this suit, being minors at the time the judgment referred to was rendered, and having been served by publication, and not having answered except by an attorney appointed by the court, and no statement of facts having been filed as required by statute, and it being shown that they had a good defense to the former suit, it would seem that they are entitled to have the former judgment set aside regardless of the question of fraud. (Rev. Stats., arts. 1346, 1375, 1376; Snow v. Hawpe, 22 Texas, 168; Wallis v. Stuart, 92 Texas, 568; Thomas v. Jones, 41 Texas, 265; Taliafero v. Carter, 74 Texas, 637.)

The second assignment complained because the court did not instruct the jury that if the consideration of a certain deed from Nancy Price to Carrie Brett was love and affection said conveyance would be a gift, and treated as an advancement, Carrie Brett being a child of Nancy Price. Appellant's brief does not show that any such instruction was requested. The record contains a special instruction covering that and several other propositions, which instruction was properly refused for reasons not relating to the question under consideration. To have presented the question referred to properly, appellant should have asked an instruction covering that question only. However, if such instruction had been asked, we are not prepared to hold that it should

have been given. We do not concede the proposition that whenever a deed from parent to child is made upon consideration of love and affection, it necessarily follows as a matter of law that the property conveyed must be treated as an advancement under the statute. In our opinion the court properly instructed the jury as to what would constitute an advancement, and we overrule the fifth assignment of error which complains of the court's charge upon that subject.

The deeds referred to under the fourth assignment were not void. A married woman can make a verbal partition of her real estate; and her deed, though not acknowledged, may be effective for the purpose of accomplishing a partition.

There are some other questions presented, all of which have been considered and none of which it is deemed necessary to discuss in this opinion, except the one raised by the seventh assignment, which asserts that the trial court should have granted a new trial because it was shown that one of the jurors was related to one of the attorneys representing the plaintiffs. The record shows that the foreman of the jury was the father-in-law of Jno. C. Meade, one of the attorneys who represented the plaintiffs; that Meade and his partner, plaintiffs' other attorney, had a contract with the plaintiffs by which they were to have a portion of the property recovered. It was also shown that appellant's attorney knew of the relationship referred to when the juror was accepted, but did not know that appellees' attorney had a contingent interest in the case; that appellant had exhausted her peremptory challenges, and if her attorney had known of the contract between appellees and their attorneys, he would have objected to the foreman sitting on the jury. However, it was not shown that appellant herself did not know of the existence and purport of the contract referred to. The record shows that she was present and testified in the case; and, for aught that is disclosed, she may have known at the beginning of the trial that the juror was related to one of appellees' attorneys, and of the existence of the contract by which that attorney would be entitled to a portion of the land recovered. Hence we hold that sufficient diligence was not shown to entitle appellant to have the judgment set aside on account of the matters referred to.

No reversible error has been shown, and the judgment is affirmed.

Affirmed.

Writ of error refused.

CITY OF TYLER v. W. F. BOYETTE.

Decided October 10, 1906.

Streets and Alleys—Dedication.

When an owner of land lays out and establishes an addition to a city and makes, exhibits and files in the county clerk's office a plat of said land, including in the plat streets and alleys, and sells the lots with clear reference to that plat, the purchasers of the lots acquire, as appurtenant to their lots, every easement, privilege and advantage which the plat represents as belonging to them, as part of the town, and title vests in the city in order that it may keep said streets in such a condition as that the traveling public may with safety pass over and along said streets.

Appeal from the District Court of Smith County. Tried below before Hon. R. W. Simpson.

R. P. Dorough, for appellant.—The court erred in rendering judgment for the defendant because the evidence shows beyond any controversy that H. H. Rowland, the original owner, made a plat of that portion of said city in which the street in controversy is situated; that he placed said plat on record in the office of the county clerk of Smith County, and sold lots with reference to said plat, thereby vesting in the city of Tyler the title to the streets shown in said plat. City of Corsicana v. Zorn, 78 S. W. Rep., 924; Heard v. Connor, 84 S. W. Rep., 605.

W. F. Boyette, in propria persona.—The acts of H. H. Rowland in making and recording the plot marking streets and alleys, and showing the land in this controversy as a street, did not and could not give to the city of Tyler or to the public any right, title or interest in and to the strip of land claimed in this suit, because the fee to said land was not in H. H. Rowland at the time or subsequent to the time the plot was made and recorded. 12 S. W. Rep., 979; 12 S. W. Rep., 986; 28 S. W. Rep., 1056; 29 S. W. Rep., 760; 28 S. W. Rep., 770.

Before a city can set up any rights of control over property it must show that it has accepted the dedication of the property. And that a dedication was properly made. 3 S. W. Rep., 309; 6 S. W. Rep., 860; 12 Atl. Rep., 130; 32 Mich., 279; 12 S. W. Rep., 462; 44 S. W. Rep., 471; 85 S. W. Rep., 470.

NEILL, ASSOCIATE JUSTICE.—This suit was originally brought by appellant, a municipal corporation, against appellee for an injunction to restrain him from fencing that part of Twenty-first Street of the city of Tyler between Glade and Holland Streets and from using and occupying said portion of the street for his private benefit. Upon filing his answer the temporary injunction which had theretofore issued was dissolved by an interlocutory order of the court. Whereupon appellant filed its first amended original petition in the nature of trespass to try title for said part of the street; to which the appellee answered by a general denial and specially plead the three, five and ten years statutes of limitation. The case was tried before the court without a jury and judgment rendered in favor of appellee from which this appeal is prosecuted.

Even if the statute of limitations ran against a city in favor of an occupant of a portion of one of her public streets, there is not a scintilla of evidence tending to support any of appellee's pleas of limitation. The questions of fact, then, are whether the land in controversy is a part of Twenty-first Street of the city of Tyler and whether appellee is a trespasser upon it.

The evidence shows beyond controversy that H. H. Rowland, formerly the owner of a certain tract of land upon which the premises in controversy are situated, made a plat of that portion of the city of Tyler where the land lies, laying the same out in blocks, streets and alleys numbering the blocks and designating the streets by name, and placed said plat on record in the county clerk's office of Smith County, intending to dedicate to the city of Tyler the streets and alleys shown by the

plat. Among the streets so designated on the plat are Twenty-first, Glade and Holland. After placing the plat on record he sold lots by it, and that portion of the land designated as streets, including Twenty-first Street, was used as streets by the public. When this plat was made and recorded does not appear from the record; but it is apparent that it was made long before the appellee encroached, as hereinafter stated, upon the part of the land in controversy. For a witness who lives on block 51 of the land designated by the plat, whose lot fronts on Twenty-first Street, testified that he had been living there sixteen years and that Twenty-first Street between Glade and Holland Streets had been used as a street all the time he lived there until the time Boyette closed it up.

The appellee owns block 25 designated on the plat made by Rowland. Twenty-first Street runs east and west just north of said block between Glade and Holland Streets which intersect it at right angles. A fence, marking the north boundary line of block 25 was on the south boundary line of Twenty-first Street before Boyette bought the block. In 1904, after appellee had owned the block a little while, he moved the fence from where it was and placed it on the north boundary line of Twenty-first Street, enclosing said street between Glade and Holland Streets. Previous to that time, Twenty-first Street was opened and had been ever since the Rowland addition of the city was platted and laid off and lots sold by it. Indeed the appellee in his sworn answer, which was introduced in evidence, to appellant's petition for an injunction, admitted that during the year 1904 he closed up and fenced that part of Twenty-first Street of the city of Tyler, between Glade and Holland Streets, a distance of about 300 feet, and at said time moved his fence from its north boundary line so as to make the north boundary line of the street the north boundary line of his premises. It is true that the appellee testified that the portion of the street which he so enclosed was never used as a street by the public. But inasmuch as his testimony shows that he was away from Tyler from 1895 to 1903, such testimony is of little, if any, value. However, under the law as we understand it, it is a matter of no moment whether such part of the street was used by the public or not. For, the proposition "that when an owner of land lays out and establishes an addition to a city and makes, exhibits and files in the county clerk's office a plat of said land, including in the plat streets and alleys, and sells the lots with clear reference to that plat, the purchasers of the lots acquire, as appurtenant to their lots, every easement, privilege and advantage which the plat represents as belonging to them, as part of the town, and title vests in the city in order that it may keep said streets in such a condition as that the traveling public may with safety pass over and along said streets," asserted by appellant's counsel under its first and only assignment of error, is too well settled in this State to admit of question. (City of Corsicana v. Zorn, 78 S. W. Rep., 924; Heard v. Connor, 84 S. W. Rep., 605; Sanborn v. City of Amarillo, and authorities there cited; 93 S. W. Rep., 473.) In view of the facts and law applicable thereto, as stated, the District Court should have rendered judgment in favor of appellant. Wherefore, its judgment is reversed and judgment here rendered in favor of the city of Tyler for the land in controversy.

Reversed and remanded.

HOUSTON RICE MILLING COMPANY v. J. W. HANKAMER ET AL.

Decided October 10, 1906.

1.—Injunction—Jurisdiction—Entire Controversy.

When a court of equity has obtained jurisdiction of a cause by reason of injunction it will retain jurisdiction for the purpose of inquiring into and adjudicating all the points of the controversy; and this rule prevails regardless of the fact that the amount involved could not originally have been sued for in the court granting the injunction.

2.—Same—Consolidation of Suits—Enjoining Judgments of Justice Court.

Where appellant was sued, with others, in the Justice Court by twenty-seven different parties in as many different suits; and where the questions of law and fact were practically the same in all said suits; and where all of said Justice Court plaintiffs claimed a lien upon the same property in appellant's possession; and where the judgments obtained in said suits were void for the want of jurisdiction in the Justice Court, the District Court having obtained jurisdiction of said causes by enjoining the further prosecution of said suits and the collection of said judgments, should have retained jurisdiction for the trial of said causes upon the merits and the adjustment of the equities of the parties. The fact that the suits could not be consolidated under the statute was immaterial; having been consolidated by the injunction they should have been tried in that condition.

Appeal from the District Court of Chambers County. Tried below before Hon. L. B. Hightower.

Marshall & Marshall and *J. R. Davis,* for appellant.—Where the court takes jurisdiction of an injunction suit to enjoin judgment for any purpose, it should take jurisdiction for all purposes and render such judgment as should have been rendered. Masterson v. Ashcom, 54 Texas, 329; Hale v. McComas, 59 Texas, 486; Pardue v. James, 74 Texas, 304; Willis v. Gordon, 22 Texas, 241; Witt v. Miller, 25 Texas Sup., 386.

Injunction will be granted when there is no adequate remedy at law. Sumner v. Crawford, 91 Texas, 129.

Injunction will lie when it appears that the party applying therefor is entitled to the relief demanded. Rev. Stats., art. 2989.

District Court will issue injunction to enforce its own jurisdiction. Rev. Stats., art. 1107.

In addition to the ground for injunction, as set forth in the foregoing proposition, another reason and ground existed, in that each of the twenty-seven cases in the Justice Court depend upon the same questions of law and fact, and therefore injunction will lie to restrain a multiplicity of suits. Galveston, H. & S. A. Ry. Co. v. Dowe, 70 Texas, 10; Paddock v. Jackson, 16 Texas Civ. App., 659; Pomeroy's Equity, secs. 222, 911.

The judgments rendered by the Justice Court are void, because court was held and cases tried at another and different place than that prescribed by the Commissioners' Court for holding said court. Const., art. 5, sec. 19; Rev. Stats., art. 1537; Koehler v. Earl, 77 Texas, 188.

Stevens & Pickett, for appellees.—If an injunction is granted against the judgment of a lower court and on hearing in term time that injunction is perpetuated, the District Court could, if the defendant in the injunction (plaintiff in the lower court) desired and asked that it be

done, enter into and hear the whole case on the merits of the original controversy and grant the defendant in the injunction such relief as he might show himself entitled to, and if on such hearing in term time the injunction is dissolved because of want of equity in the application therefor, and the plaintiff declines to amend, then the cause is dismissed or judgment entered on demurrer. O'Neal v. Wills Point Bank, 64 Texas, 646; Hale v. McComas, 59 Texas, 486; Love v. Powell, 67 Texas, 16.

It was held by the following cases that even if separate suits are capable of being consolidated, a consolidation should not be granted where the amounts when consolidated defeat the court's jurisdiction. Mohrhardt v. S. P. & T. N. Ry. Co., 2 Texas App. Civ. Cases, sec. 322; Texas & Pac. Ry. Co. v. Hays, 2 Texas App. Civ. Cases, p. 341; St. Louis, I. M. & S. Ry. Co. v. Edwards, 3 Texas App. Civ. Cases, p. 416.

It is not within the power of one court to consolidate causes pending in another court. Galveston, H. & S. A. Ry. Co. v. Ware, 2 Texas App. Civ. Cases, sec. 357.

Even if there had been rice of a value within the jurisdiction of the District Court subject to a lien of each appellee, that would not have authorized the District Court to interfere with the prosecution of the suits in the District Court; first, because that was a matter in which appellant was not concerned; as to how their different liens should be protected was for the appellees to look after; and second, our courts hold that in the foreclosure of a labor lien the amount of the debt sued for and not the value of the property governs the jurisdiction. See Allen v. Glover, 65 S. W. Rep., 379; Texas & S. L. Ry. v. Allen, 1 Texas App. Civ. Cases, sec. 568.

FLY, ASSOCIATE JUSTICE,—Appellant applied for a writ of injunction to restrain the collection of judgments obtained by twenty-five persons against it in a Justice's Court of Chambers County, each one based on a separate claim. It was alleged that Lee Barrow, Clarence Barrow, John M. Barrow and Eliza J. Barrow were sued with appellant, they having employed each of the plaintiffs to do certain work in and about certain rice, appellant being sought to be held liable on the ground that it had converted the rice with full knowledge that each of them had a laborer's lien on it. Appellant denied the existence of the lien and proceeded as follows: "Now plaintiff says that by reason of the facts set forth herein in paragraphs No. 1, 2, 3, and 4, showing the nature of the claim asserted by the defendants who have filed said suits in said Justice Court, and because the claims in each of said cases are the same and growing out of the same alleged acts of this plaintiff and defendants John M., Lee and Clarence Barrow and because the evidence, facts and testimony to establish or to attempt to establish any one case, except as to the amount of the sum due each, is the same in each and all of the said cases, that the rights and claims of the said defendants who have sued plaintiff depend on the same question of law and fact. And further plaintiff says that because each of said defendants is attempting to establish a laborer's lien on the same crop of rice and is attempting to subject the said crop of rice to the alleged laborer's lien, that all of said defendants have a common or community of right and alleged interest

in the subject matter of this litigation insofar as the laborer's lien contention is asserted. Plaintiff further says that because of the facts set forth in paragraphs 1, 2, 3 and 4 herein, that this plaintiff has the same defense to each of said suits in said Justice Court and a common defense to all of them. Plaintiff further shows the court that said cases pending in the said Justice Court can not be consolidated in said court for the reason that the aggregate amount of said suits is without the jurisdiction of said court, to wit, the sum of $654.75. Plaintiff further says that the said Justice Court, because all of the suits therein pending are separate and distinct and because the various plaintiffs therein are not parties to each suit and all suits, can not adjust and arrange priorities of liens, if liens are established, among the various plaintiffs therein, defendants herein; that because said priorities can not be adjusted by said Justice Court, that this plaintiff, if found liable on the lien feature of said suits, would be unable to protect itself even when the subject matter of the lien is exhausted, because by virtue of the justice judgment against this plaintiff each of said defendants would have a lien of equal rank with all others and on which plaintiff would be liable on all. Plaintiff further says that while some of said cases insofar as amounts sued for are concerned can be appealed to the County Court, that said appeals would be ineffective to adjust priorities among said parties and to protect plaintiff thereunder.

"Wherefore plaintiff says he has no adequate remedy at law to protect its rights in said Justice Court.

"Plaintiff further shows the court that while the various plaintiffs in said Justice Court (defendants herein) have cases depending upon the same questions of law and fact and have a community of interest and right in the subject matter thereof, to wit, the alleged lien on said crop of rice, and while plaintiff has a common defense to all of said suits, yet because each of said defendants have filed a separate suit this plaintiff will have to make twenty-six different defenses and if cast in the cases will incur the costs of twenty-six cases. Wherefore this plaintiff says that it is entitled to have the further prosecution of said case enjoined in said Justice Court and all of same tried in one action in this court in order to protect plaintiff from a multiplicity of suits and vexations and unnecessary litigation, expenses and costs." Grounds were set up as to the nullity of the judgments which were admitted by appellees to be well taken and the court enjoined the execution of the judgment, but refused to try the question as to whether appellant was liable for conversion of the rice.

We will not inquire into the correctness of the judgment enjoining the collection of the judgments rendered by the Justice's Court on the ground of their nullity, because appellees seem to be perfectly satisfied with it, and the only question presented is that of the correctness of the action of the court in refusing to try the question of appellant's liability on account of its conversion of the property on which each of the different plaintiffs in the Justice's Court claimed a laborer's lien.

It is a well established rule of equity, adopted by the courts of Texas, that when a court has obtained jurisdiction of a cause by reason of injunction it is authorized to retain that jurisdiction for the purpose of inquiring into and adjudicating all points of controversy. (Edrington

v. Allsbrooks, 21 Texas, 186; Bourke v. Vanderlip, 22 Texas, 221; Willis v. Gordon, 22 Texas, 241; Witt v. Miller, 25 Texas Supp., 384; Trevino v. Stillman, 48 Texas, 561; Masterson v. Ashcom, 54 Texas, 324; Hale v. McComas, 59 Texas, 484; Chambers v. Cannon, 62 Texas, 293; Stein v. Frieberg, 64 Texas, 271; Seymour v. Hill, 67 Texas, 385; Pardue v. James, 74 Texas, 304; Carter v. Hubbard, 79 Texas, 356; Ablowich v. Greenville Nat. Bank, 95 Texas, 429.) This rule prevails regardless of the fact that the amount involved could not originally have been sued for in the court granting the injunction.

In this case the judgments of a number of plaintiffs in the Justice's Court have been held void, for reasons admitted by such plaintiffs to be valid, and no reason is offered as to why the District Court having obtained jurisdiction of the cases for purposes of injunction should not proceed to adjudicate all matters of controversy between the parties. It is useless to contend that the causes could not be consolidated, under the statute, because having been consolidated for the purpose of injunction, they are in a consolidated condition in the District Court, and having them there in that condition they should be tried on their merits.

The pleadings clearly set out that each and all of the parties, who were plaintiffs in the Justice's Court, claim a lien on rice which has been appropriated by appellant, and in connection with that lien there is a community of interest among the appellees, that would entitle appellant to a consolidation on that point, if nothing more. Upon the question of the lien on the rice hangs the responsibility and liability of appellant, and that runs like a thread through the warp and woof of the different cases. Appellant has brought all of the parties into court, and properly so, on the question of injunction, and having enjoined the judgments it has the right to demand that every issue in the case be determined. The effect doubtless is to give appellant an advantage that it could not have obtained on an appeal, but that may be true in case of the enjoining of any judgment of the Justice's Court. The jurisdiction of the Justice's Court would have never been ousted had not the plaintiffs admittedly placed themselves in such position as to have their cases haled into another court by having void judgments rendered against appellant. It is not apparent that they will be placed at any disadvantage by having their cases tried in the District Court. The District Court having acquired jurisdiction of the cause for purposes of the injunction can and should proceed to do full equity between the parties, and should hear and determine the whole case. (Pardue v. James, above cited.)

The part of the judgment of the District Court enjoining the judgments of the Justice's Court will be affirmed, but that portion denying a trial on the merits of the cases will be reversed and the cause remanded to be tried on all the issues between all the parties.

Affirmed in part and reversed in part.

Writ of error dismissed.

TEXAS & NEW ORLEANS RAILROAD COMPANY v. STATE OF TEXAS.

Decided October 11, 1906.

1.—Payment of Taxes—Authority of Collector.

The payment of taxes to a tax collector before they are due and before the tax rolls had been delivered to him, is not binding on the State.

2.—Defaulting Tax Collector—Remedies.

For the collection of taxes prematurely paid to a collector who afterwards defaulted the State has two remedies; one against the collector and his bondsmen; and the other against the taxpayer. Orange Co. v. Texas & N. O. Ry. Co., 80 S. W. Rep., 670, followed.

3.—Same.

By arrangement between the bondsmen of a defaulting tax collector and the attorney for the State it was agreed that in consideration of said attorney forbearing suit against said bondsmen for the amount of taxes prematurely paid by a certain taxpayer to said collector the bondsmen would at their own expense prosecute a suit in the name of the State against said taxpayer for the taxes so prematurely paid and in the meantime would deposit with the State the amount of taxes claimed by it, to abide the successful result of said suit. Held, said arrangement was no defense to the taxpayer in the suit instituted in pursuance thereof. The payment by the bondsmen of the amount of the taxes to the attorney for the State did not in fact discharge the State's claim.

Appeal from the District Court of Orange County. Tried below before Hon. W. P. Nicks.

Baker, Botts, Parker & Garwood and *Chester & Chester,* for appellant. —When, after the tax rolls have been made up and approved by the Commissioners' Court, and the amount of the taxes thus ascertained and fixed, but before the rolls are delivered to the tax collector, he demands and receives from the taxpayer the amount of the same and receipts for the same as such, and has such funds in his possession when the rolls are delivered to him, then, as between the State and the collector, this would constitute a payment of the tax, and for the amounts so collected the collector and his bondsmen would be primarily liable to the State. Rev. Stats., arts. 5164, 5166 and 5210; Mast v. Nacogdoches Co., 7 Texas, 384; Webb Co. v. Gonzales, 69 Texas, 456; Morris v. State, 47 Texas, 592; Simons v. Jackson Co., 63 Texas., 430; Cooley on Taxation (2d ed.), pp. 706-709, and authorities cited; Lynn v. Mayor of City of Cumberland (Sup. Ct. Maine), 26 Atl. Rep., 1001.

Holland & Holland, for appellee.

GILL, CHIEF JUSTICE.—This suit was brought by the State of Texas against the Texas and New Orleans Railroad Company for taxes due for the year 1898 upon its road and certain other of its property situated in Orange County.

The railway company defended, first, on the ground that it had paid the sum claimed to Bland, the tax collector, and had his receipts therefor; second, if such payment was not made under circumstances which amounted to a quittance of the company, the bondsmen of the tax col-

lector Bland had nevertheless paid to the Attorney General the sum claimed in satisfaction of the State's demand and the State had no interest in this suit.

There was a judgment for the State and the company has appealed.

The facts which are undisputed are as follows: On the 27th day of September, 1898, the defendant paid to Jeff D. Bland, the tax collector of Orange County, duly elected and qualified, the State and county taxes due by the company in that county for that year, and took his official receipt therefor. At the date of this payment the taxes were not due and Bland had no warrant to collect them the Commissioners' Court not then having delivered the tax rolls to him. The taxes were due and the rolls to be delivered on October 1 of that year. Bland defaulted, and another was appointed to his office. Bland never paid to the State the sum thus collected from the defendant. The Attorney General of the State was about to institute suit against the bondsmen on Bland's official bond to recover the sum in question when the bondsmen induced him to pursue his remedy against the defendant railway company, the attorneys of the bondsmen offering to conduct the suit in behalf of the State to a successful termination. The bondsmen also offered to place in the hands of the Attorney General a sum equal to the amount then due by the defendant as taxes, to be held by him and turned into the State treasury in discharge of the bondsmen's liability in case the State's suit failed, but to be returned to the bondsmen if the suit was successful. These propositions were accepted by the Attorney General and the sum agreed on placed in his hands. So far as the record discloses it is still held in the Attorney General's office subject to the terms of the agreement. This suit was brought by authority of the Attorney General, Messrs. Holland & Holland, attorneys for the bondsmen conducting it. The sum placed in the hands of the Attorney General was $1,279.29. The amount recovered in behalf of the State in the court below was a like sum but the interest added at the date of the judgment increased the total to $1,754.74.

By the first assignment appellant complains of the judgment on the ground that the payment to Bland was binding on the State notwithstanding it was made at a time when the rolls had not been delivered to him. This assignment is overruled without discussion as the point was decided adversely to this contention in the case of Orange County v. Texas & N. O. Ry. Co., 80 S. W. Rep., 670.

The other defense presents a question which is not free from difficulty. We are of opinion, however, that the trial court was correct in holding that the arrangement between the bondsmen and the Attorney General was not binding on the State. It is undoubtedly true that the State had either of two remedies upon the default of Bland. One against Bland and his bondsmen, to which the fact that the tax had been prematurely collected would have been no defense. Both Bland and his bondsmen would have been estopped to set it up. (Webb Co. v. Gonzales, 69 Texas, 456; Mast v. Nacogdoches Co., 71 Texas, 384; Morris v. State, 47 Texas, 592.) The other against the railway company who as clearly could neither defend on the ground that the State also had a remedy against the bondsmen nor recover over against them the sum recovered

by the State. There was no privity between the taxpayer and the bondsmen. The company's remedy was against Bland.

While the State had two remedies it in fact chose the one against the company. We know of no power which may coerce the discretion of the Attorney General to choose one remedy rather than another. Nor may we inquire into the motives which controlled his choice further than to determine that the payment to him did not in fact discharge the State's claim, and this it clearly did not do. It is equally clear that the bondsmen are powerless to appropriate this judgment to their own use. They can not successfully question the right of the State to the fruits of this litigation. If they were permitted to do so the State would lose about $500 in interest which has accrued on the liability while the sum placed with the Attorney General has lain idle in his hands.

We think the judgment should be affirmed, and it is so ordered.

Affirmed.

H. B. FALL v. W. A. NICHOLS ET AL.

Decided October 13, 1906.

Building Contract—Abandonment—Mechanic's Lien.

By the terms of a building contract between the owner of the building and the contractor it was provided that in case of refusal or neglect of the contractor to furnish sufficient and proper material and labor, the owner should have the right to supply the same and deduct therefor from the contract price. After the work was partly done, the contractor told the owner that he was financially unable to procure the labor and materials for the completion of the building, and requested the owner to procure and pay for them and to deduct such expenditures from the contract price. This the owner did. Held, that neither the owner nor his building was liable to parties who had furnished material to the contractor, beyond the balance of the contract price remaining in the owner's hands after the completion of the building.

Appeal from the District Court of Jefferson County. Tried below before Hon. L. B. Hightower, Jr.

Carlton & Proctor and *E. E. Townes,* for appellant.—The evidence in this case shows an abandonment of his contract by the contractor of such a character as to give to the defendant Fall as owner a right to take charge of the building and complete it according to the plans and specifications. Rev. Stats., arts. 3305, 3308 and 3296; Baumgarten v. Mauer, 60 S. W. Rep., 451; Ricker v. Schadt, 23 S. W. Rep., 907; House v. Schultze, 52 S. W. Rep., 654; Riter v. Houston Oil & Refining Co., 48 S. W. Rep., 758; Timmons v. Casey, 47 S. W. Rep., 805; Campbell v. Coon (N. Y.), 38 Law Rep. Ann., 410.

Hardy & Hardy, for appellees.

GILL, CHIEF JUSTICE.—W. A. Nichols sued Hawkins and Delaney, contractors, to recover a judgment against them for the price of material furnished them by him to be used by them in the construction of a house for H. B. Fall which they had contracted to build for Fall. Nichols also sought to establish a material man's lien against the house and lot

to secure his claim. The Texas Builders and Supply Company brought a like suit against the same parties and they also sought to establish and enforce a lien on the premises against Fall.

The suits were consolidated and tried as one. To each Fall answered by general denial, and specially pleaded that the liens ought not to be declared against his property for a greater sum than $185 because after a part of the work had been done by the contractors they became financially unable to procure and pay for the material and labor necessary to complete the work according to contract. That thereupon by their consent and at their request he undertook and did procure and pay for the labor and material necessary to complete the work, and had the work completed for one hundred and eighty-five dollars less than the contract price. That this remainder belonged to the contractors, was subject to the plaintiffs' claims and he had held it and continued to hold it subject thereto. That under a clause in the written contract with Hawkins & Delaney he had the right to pursue the course he did in case the contractors neglected or refused to complete it.

A trial before the court resulted in judgments as prayed for against the contractors and the foreclosure of the alleged liens in the sums for which liens were claimed. Fall alone has appealed.

The trial court filed findings of fact and conclusions of law. We approve his fact findings as to the existence and terms of the building contract, the amount of the claims of plaintiffs against the contractors and the facts found by the court bearing upon the issue as to whether the liens had been fixed by a compliance with the statutes governing the fixing of such liens. We adopt his findings upon these points and thus avoid the necessity of setting out in this opinion the itemized accounts, notices, affidavits, etc., whereby the claimants sought to fix liens upon the property. The following general statement will suffice for the purposes of this opinion.

On the 19th day of December, 1901, Hawkins & Delaney, a firm of contractors, entered into a written contract with H. B. Fall to construct on a lot that belonged to him in Beaumont, Texas, a house, according to the plans and specifications agreed on. The price to be paid was $7,434.70, payable when the labor and material had been furnished by the contractors and the building properly completed. Among other things the contract contained, in substance, this provision: In case of refusal or neglect of the contractors to furnish sufficient and proper materials and labor the owner was given the right to supply the same and deduct therefor from the contract price.

After the work had been partly done Hawkins, one of the contractors, went to Fall and told him that the contractors were financially unable to procure the labor and materials for the completion of the contract, and requested Fall to procure and pay for them what they might reasonably cost, deduct their cost from the contract price and if anything remained after the building was thus finished it should belong to the contractors. Fall thereupon undertook and did pay cash for all labor and material reasonably necessary to complete the building according to contract. It was so done by him, and when so completed $185 remained of the contract price after deducting what it cost him to complete the building and certain payments which he had made to plaintiffs for

material furnished by plaintiffs to the contractors before Fall undertook its completion and a small payment made to the contractors prior to any notice from plaintiffs as to what they had furnished the contractors, about which payment no question seems to be made on this appeal.

The court found generally that plaintiffs had done all things necessary to fix their liens. That the contractors had not abandoned their contract and that the building was completed under the contract, from which he concluded that the plaintiffs should have their liens, notwithstanding he also found the contractors' financial inability to complete the work, and the completion of it at the expense of Fall under the provision of the contract, which under such state of facts, permitted him to do so at reasonable cost.

The appellant assails as unsupported by the evidence the finding of the court that the contractors did not abandon their contract. Whether or not this assignment should be sustained must depend on what the court meant by the term "abandonment." As a matter of fact the contractors' rights and the plaintiffs' rights would have been the same whether the contractor refused to proceed further with the work and went no more about the building, or whether he remained with the building while the defendant Fall exercised his rights under the modified arrangement growing out of the admission by the contractors that they were unable to finish the work. In the one case, if the owner completed the work at reasonable expense the law would give to the contractors' creditors what remained of the contract price when the contract was finished and no more, and the rule would not be different under the facts found by the court. We hold therefore that if the finding complained of should be construed to mean that the contractors did not, by saying they were unable to complete the work, induce the defendant Fall to do it, the assignment should be sustained. If, however, it merely means that the work was in fact completed pursuant to the plans and specifications, and that the contractors did not release their right in the contract nor their right to remain and see that the work was cheaply and expeditiously done, then the assignment should be overruled.

The court having found that the contract provided that the owner might procure the material and labor in case the contractors failed and neglected to do it, that the necessity arose and the owner actually exercised his right under this provision, we can perceive but one possible end to this cause. That an owner may contract as he pleases for the erection of a building is beyond question. He may contract to pay cash in advance. Those who work for a contractor, or who furnish him with materials, do so with reference to the terms of his contract with the owner so far as the question of liens is concerned. An owner without fault can not be held beyond the contract price no matter how inadequate it is compared with the actual cost of the structure. Nor can an owner who in dealing with his contractor does not exceed the privileges of his contract be held to a sum in excess of what remains after those privileges have been exercised.

In this case the contract price was payable on the completion of the building. As long as the contractors were proceeding with the construction of the building and furnishing the proper and requisite amount of material and labor the owner owed it to the laborers and material

men who were preserving their rights in accordance with law to withhold all payments until the completion of the building, or else withhold enough to protect such laborers and material men in the collection of their claims. But when the contractors confessed their inability to proceed, the owner's right, both at law and according to an explicit provision of this particular contract, intervened and became paramount. He had the right to complete the building at his own expense, parting for such purpose with only such sums as were reasonably necessary to complete the building according to plans and specifications.

In view of this conclusion we do not discuss any other assignments. We are of opinion, however, that the assignments assailing the accounts as not sufficiently itemized are meritorious.

We conclude the judgment should be reversed and here rendered in favor of appellant, and that the $185 held by the owner subject to the order of the court be apportioned between the plaintiffs with reference to the amount of their claims established against this fund, and that a lien be established and foreclosed for that amount. Inasmuch as defendant has at all times admitted his liability for this sum and held it subject to the court's order he is not liable for interest thereon, and his assignment upon that point is sustained.

Reversed and rendered.

Writ of error refused.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY ET AL. v. J. A. FRAZAR.

Decided October 13, 1906.

1.—Shipment of Cattle—Contract—Agent—Authority.

In a suit for damages for delay in transporting cattle to market upon a "feed in transit" contract, plaintiff was allowed to testify that in making the shipment from the station at which said cattle were fed, the same being a station upon an intermediate road and not on appellant's line of road, he made a contract with the agent at said station that plaintiff's cattle were to be transported through to destination without being unloaded and were to reach their destination in time for the market of a certain day, and that no other freight was to be picked up on the road by said train of cattle. Appellant objected to said testimony, because it was not shown that said agent had any authority to make such an agreement on behalf of appellant; because the same was beyond the scope of his authority; because it was not shown that said agent was the agent of appellant or had any authority to act for it, and because the evidence showed that said cattle could not be transported that distance in 28 hours and said contract was therefore illegal and void. Held, in view of the evidence in the case, the objections should have been sustained. Gulf, C. & S. F. Ry. Co. v. Jackson, 14 Texas Ct. Rep., 100, followed.

2.—Statement by Brakeman—Not Evidence.

The brakemen of a railroad company have no authority to tell a shipper that his cattle would not be transported on another line of road until a certain time and bind their own company by such statement.

3.—Through Contract of Shipment—Liability.

When the contract of shipment comprehends the entire distance from the initial point to destination a carrier bound by the contract can not relieve itself of the negligence of an intermediate carrier.

Appeal from the County Court of Clay County. Tried below before Hon. S. A. Denny.

C. H. Yoakum and *R. E. Taylor,* for appellants.—The court erred in admitting the testimony of the plaintiff as to the contract made by him with the agent at Tishimingo. Gulf, C. & S. F. Ry. Co. v. Hodge, 30 S. W. Rep., 829; Gulf, C. & S. F. Ry. Co. v. Jackson & Edwards, 14 Texas Ct. Rep., 100; Missouri, K. & T. Ry. Co. v. Belcher, 32 S. W. Rep., 518; Gulf, C. & S. F. Ry. Co. v. Dinwiddie, 51 S. W. Rep., 353; Louisville & A. Ry. Co. v. Bennett, 76 S. W. Rep., 409.

The court erred in admitting the testimony of the plaintiff over said defendant's objections, and in overruling said defendant's motion to exclude the same, wherein the plaintiff testified that when said cattle reached St. Louis he had a conversation with one of defendant's brakemen, and that said brakeman told plaintiff that his cattle would not go over to the stock yards till the next morning, because said brakeman had no authority to make such statement and the same was beyond the apparent scope of his authority, and said defendants were not bound by said statement.

The court erred in refusing said defendants' requested charge wherein said defendants requested the court to charge the jury that they would not be responsible for any damages that may have resulted to the plaintiff's cattle by reason of any delay on the part of the Merchants Bridge Company in transporting said cattle across the river to the stock yards after they had reached St. Louis, because the evidence showed that said cattle were delayed 8 or 9 hours by said Merchants Bridge Company, and these defendants were not responsible for such delay.

J. C. Chessnutt and *P. M. Stine,* for appellee.

CONNER, CHIEF JUSTICE.—This is an appeal from a judgment in favor of the defendant in error for the sum of $366.98 against the St. Louis & San Francisco Railway Company and the St. Louis, San Francisco and Texas Railway Company for damages to a shipment of two hundred and eleven cattle made from a point in Texas on the Fort Worth & Denver Railway to the National Stock Yards in East St. Louis, Illinois. It was alleged that the agent of the Fort Worth & Denver City Railway Company at the initial point of the shipment, agreed to transport said cattle on a "feed in transit rate" to the National Stock Yards, Illinios; that by the terms of the agreement, defendant in error was permitted to stop his cattle at Tishimingo, I. T., a station on the line of the Choctaw, Oklahoma and Gulf Railway Company, and there feed his cattle for one hundred and twenty-five days before further transportation. Defendant in error further alleged that after feeding for one hundred and five days at Tishimingo, he redelivered his cattle to the Choctaw, Oklahoma & Gulf Railway Company (alleged to be an agent of the plaintiffs in error), and that the agent thereof, acting as the agent of all of the transporting companies, agreed and contracted to transport said cattle from Tishimingo to their final destination without delay or change of cars or stopping to feed at any point between Tishimingo and the National Stock Yards, and agreed to reach said stock yards in time for the market on a day

named. It was alleged, and there was evidence tending to show, that the provisions of this contract with the agent at Tishimingo had been violated, in consequence of which, damages resulted as prayed for.

Upon the trial defendant in error was permitted to testify, over objection, that in making the shipment from Tishimingo, he made a verbal contract with the agent of the Choctaw, Oklahoma & Gulf Railway Company at Tishimingo, Indian Territory, by which it was agreed that plaintiff's cattle were to be transported through to East St. Louis without being unloaded, and that said cattle were to reach East St. Louis in time for the market of April 6, and that they would be transported without picking up other freight on the road with said train of cattle." Plaintiffs in error objected to this proof, "because it was not shown that said agent had any authority to make such an agreement on behalf of said defendants, and because the same was beyond the apparent scope of his authority, and because it was not shown that said agent was the agent of these defendants, or had any authority to act for them, and because the evidence showed that said cattle could not be transported from Tishimingo to their destination in twenty-eight hours, and said contract was therefore illegal and void." We think the objections should have been sustained and said testimony excluded.

Defendant in error testified, "I made the contract to ship the cattle with Charles Barkdull, the agent of the Fort Worth & Denver City Railway Company at Henrietta. . . . These cattle were to be shipped from where they were loaded to Tishimingo, I. T., and from there to East St. Louis, Illinois. I agreed to pay 42½ cents per one hundred pounds and ten dollars a car extra for the privilege of stopping over at Tishimingo one hundred and twenty-five days and feeding. . . . I brought these cattle and delivered them to the Denver under my contract of shipment made with the Denver agent. . . . The whole shipment was made on the through contract from Henrietta." No specific agreement as to the time or manner of the transportation appears to have been made with the Denver agent, nor does the record contain any proof of authority on the part of the agent at Tishimingo to specifically agree, as defendant in error testifies that he did agree, and it seems clear to a majority of us that authority to do so is not to be implied. The agent at Tishimingo, so far as shown by the record, was merely the local agent of one of the intermediate carriers. As such, authority to supplement the original contract—the contract upon which the shipment was made—is not to be inferred. Nor is additional consideration therefor shown. It also appears that the cattle could not reasonably have been transported from Tishimingo to the National Stock Yards within the twenty-eight hour period designated by the United States statute as the period beyond which cattle shall not be transported without stopping for feed and water. The case seems to fall clearly within the case of Gulf, C. & S. F. Ry. v. Jackson & Edwards, 14 Texas Ct. Rep., 100, decided by our Supreme Court, and hence we all conclude that for the error of the court indicated the judgment must be reversed and the cause remanded.

In view of another trial, we will also say that the conversation with one of the brakemen at St. Louis, objected to in the second assignment of error, should have been excluded on the ground of a want of authority in the agent to make the statement.

The court properly refused special charge number 3 mentioned in the third assignment for the reason that the contract of shipment, as alleged and proven, comprehended the entire distance from the initial point to the National Stock Yards, and plaintiffs in error, therefore, could not relieve themselves of the negligence, if any, of the bridge company, in transporting the cattle from St. Louis, Missouri, across the river to the stock yards.

Judgment reversed and cause remanded.

Reversed and remanded.

TEXAS & PACIFIC RAILWAY COMPANY v. BEAL & SELF.

Decided October 13, 1906.

1.—Infected Cattle Pens—Allegation—Proof.

Plaintiffs shipped several carloads of calves from a point in Texas to a northern market intending to sell them as feeders, but because defendant's cattle pens, from which said calves were shipped, were infected by a contagious disease they could only be sold at a reduced price for immediate slaughter. Plaintiff proved the alleged difference in the price of feeders and of calves for slaughter, but made no proof of when, where, how or at what price the calves in question were sold, or that they were sold at all. Held, the case alleged was not proved.

2.—Same—Knowledge.

In a suit for damages caused to plaintiffs by shipping their cattle from infected pens, it was necessary to allege and prove that defendant knew that the pens were infected, or by reasonable care might have known it.

3.—Same—Pleading—Proof.

A charge that it was the duty of defendant to have "proper and suitable shipping and feeding pens" is not warranted by an allegation that defendant had been notified by the federal authorities that its pens had been quarantined.

Appeal from the County Court of Mitchell County. Tried below before Hon. W. B. Crockett.

Ed. W. Smith, for appellant.

M. Carter and *G. B. Harness,* for appellee.

STEPHENS, ASSOCIATE JUSTICE.—Appellant carried four cars of calves belonging to appellees from Stanton, Texas, to the northern market, two cars to East St. Louis and two to South St. Joseph. It was the purpose of appellees in making this shipment to sell the calves for feeders, but owing to the fact that diseased cattle, that is, cattle with scabies, had infected the pens at Stanton just prior to this shipment, the calves were quarantined at Fort Worth and had to go forward, as exposed cattle, for immediate slaughter. It was claimed that this resulted in a loss of fifty cents per hundred pounds. Damage due to delay at Fort Worth was also claimed.

The alleged difference between the price of feeders and of cattle sold for immediate slaughter was proved, but appellees utterly failed to prove when, where, how, or at what price they had sold their calves, or even that they had sold them at all. They also failed to prove that appellant

had any knowledge of the infected condition of its pens at Stanton when it received the calves for shipment, and if its ignorance of this fact was due to negligence no such ground of recovery was alleged in the petition. The case alleged, therefore, was not made out in the proof, and the court should have granted a new trial.

The court also erred in submitting as a ground of recovery the duty of appellant to have "proper and suitable shipping and feeding pens," since no such ground was to be found in the petition, the only ground alleged being that appellant had been notified by the agent of the Bureau of Animal Industry of the Federal Government that the pens at Stanton had been quarantined, and had permitted appellees, in ignorance of this fact, to place their cattle therein.

The judgment is therefore reversed and the cause remanded for a new trial.

Reversed and remanded.

WESTERN UNION TELEGRAPH COMPANY v. J. F. WAFFORD.

Decided October 13, 1906.

Delivery of Telegram—Idem Sonans.

The names "Warford" and "Wafford" are of such similarity in sound as reasonably to indicate the same person, and therefore a telegraph company would be charged with the duty of delivering a message addressed to Frank Warford to J. F. Wafford.

Appeal from the District Court of Potter County. Tried below before Hon. Ira Webster.

John W. Veale, N. L. Lindsley and *Geo. H. Fearons,* for appellant.—Where it appears, as in this case, that the defendant contracted to deliver the message to Frank Warford, and that the plaintiff is named J. F. Wafford, there devolved upon the defendant no legal duty to deliver such message to the plaintiff J. F. Wafford or to any other person than the one named in the message, and under such circumstances it was error for the court to charge the jury that it was the duty of the defendant to deliver this message to the plaintiff J. F. Wafford. Western U. Tel. Co. v. Smith, 88 Texas, 9; Ward v. Western U. Tel. Co., 52 S. W. Rep., 259; Croswell on Electricity, sec. 609.

Barrett, Stewart & Templeton and *Turner & Boyce,* for appellee.

SPEER, ASSOCIATE JUSTICE.—Appellee sued appellant to recover damages, alleging that it was negligent in the delivery of the following message: "Mount Pleasant, Texas, January 15, 1905. Mr. Frank Wafford, Amarillo, Texas. Ellar is dead. Come at once. J. F. Nichols." The "Ellar" mentioned was a sister of appellee's, and it was alleged that the negligence of appellant resulted in his failure to be present at her funeral. From a judgment in appellee's favor for the sum of two hundred dollars this appeal has been perfected.

Appellant insists, and the insistence is the gist of this appeal, that the message in question was addressed to "Frank Warford," as to which

it produced evidence, and that the appellee's name is "J. F. Wafford," and that therefore there was no legal obligation resting upon it to deliver the message to him. Appellee, however, alleged that the message was addressed as indicated in our statement of the case, and moreover, produced the evidence of more than one witness to that effect. So, at most, under this state of the evidence, the court could not have submitted appellant's summary instruction to find in its favor upon this supposed variance. But aside from this, there was no error, since we must hold that the names "Warford" and "Wafford" are of such similarity of sound as reasonably to indicate the same person. There is no need of the rule of *idem sonans* as applied to names if such names are identical in orthography and orthoepy, but the rule is that where the names are not the same, but so similar that "the attentive ear finds difficulty in distinguishing them when pronounced, they will be considered as *idem sonans.*" (Bosse v. Cadwallader, 24 S. W. Rep., 798.) In the case cited, the names "Bosse" and "Busse" were held to be *idem sonans.* In the present case, we think the difference is less pronounced than in that, the liquid *r* flowing so gently into the *f* as to be hardly perceptible to the most attentive ear. The names, then, being *idem sonans,* it was the duty of appellant to exercise ordinary care to deliver the message in question to appellee, and its failure to do so, resulting in damage to him, was actionable.

The judgment is in all things affirmed.

Affirmed.

W. L. WOOD v. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS.

Decided October 13, 1906.

Appeal in Forma Pauperis—Art. 1401, Rev. Stats., Construed.

Where in an appeal in forma pauperis the affidavit of inability to pay or secure the costs is made before a notary public of the county of the trial, and there is nothing in the affidavit or the record to show that proper proof of appellant's inability to pay the costs or any part of the same was made before the county judge of the county where appellant resides, or before the court trying the cause, the appeal will be dismissed. The statute concerning the amendment of appeal and writ of error bonds has no application to such case.

Appeal from the District Court of Tarrant County. Tried below before Hon. Mike E. Smith.

O. S. Lattimore and *Browning & Smith,* for appellant.

Spoonts, Thompson & Barwise, for appellee.

CONNER, CHIEF JUSTICE.—This suit was instituted by the appellant to recover damages for personal injuries alleged to have been sustained by him while loading a wagon with lumber from one of appellee's cars. Appellant alleged in this petition negligence on appellee's part in the preparation of the grounds where the injury was received, and the court

sustained general and special exceptions to the petition. Appellant having declined to amend, the suit was dismissed, and hence this appeal.

The appeal has been prosecuted *in forma pauperis* and appellee moves to dismiss the appeal on the ground that appellant has neither filed an appeal bond nor made proper proof of his inability to pay or secure the costs. The affidavit of inability to pay costs or to give security therefor is in form, perhaps, sufficiently in compliance with article 1401 of the Revised Statutes, save that it appears to have been verified before a notary public of the county of the trial, and nothing upon the face of the affidavit, nor in the record, appears showing that proper proof of appellant's inability to pay the costs, or part thereof, was made before the county judge of the county where appellant resides, or before the court trying the case, as required by the article referred to. This article provides that "where the appellant or plaintiff in error is unable to pay the costs of appeal, or to give security therefor, he shall nevertheless be entitled to prosecute his appeal, but in order to do so, he shall be required to make strict proof of his inability to pay the costs, or any part thereof. Such proof shall be made before the county judge of the county where such party resides, or before the court trying the case, and shall consist of the affidavit of said party stating his inability to pay the costs; which affidavit may be contested by any officer of the court or party to the suit, whereupon it shall be the duty of the court trying the case, if in session, or the county judge of the county in which the suit is pending, to hear evidence and to determine the right of the party under this article to his appeal." In Graves v. Horn, 89 Texas, 77, our Supreme Court held that an affidavit made before the clerk and filed in his office was not a compliance with the above statute, either in substance or form. The reasons upon which this decision is founded apply with equal force to the affidavit before us, which hence must be held to be insufficient. The affidavit before us is in legal effect the same as if no affidavit had been filed in the trial court. Nor does the statute cited comprehend the amendment of a defective affidavit. Its terms relate only to appeal or writ of error bonds, and no authority seems to have been conferred upon this court to conduct a contest of the truth of an affidavit made in lieu thereof, which contest, or a right to contest, as before stated, is expressly conferred by the statute.

We conclude that the motion to dismiss the appeal should be sustained and the appeal dismissed.

Dismissed.

Texas & Pacific Railway Company v. M. M. Terry, Jr.

Decided October 13, 1906.

1.—Improper Testimony—Bill of Exception.

When the bill of exception fails to show what objection was made to the admission of testimony an assignment of error based thereon can not be considered.

2.—Improper Argument—Error.

When the evidence is conflicting improper statements of counsel for plaintiff in his closing argument, duly excepted to, constitute reversible error.

Appeal from the County Court of Callahan County. Tried below before Hon. I. N. Jackson.

F. S. Bell, for appellant.

John W. Wood, for appellee

STEPHENS, ASSOCIATE JUSTICE.—Injury to a car of horses carried from Barstow to Baird, due to the condition of the car and to rough handling, was the ground of recovery.

Error is first assigned to the admission of appellee's testimony, that he had been offered ten dollars per head for the horses in their injured condition, but the bill of exceptions fails to show what objection was made to this testimony, and the assignment must therefore be overruled. That such testimony is generally inadmissible, see Texas & Pac. Ry. v. Randle, 44 S. W. Rep., 603.

The court permitted counsel for appellee in his closing argument, over the objection of appellant, and to which error is assigned, to use the following language: "You know how these railroad men testify, they always swear that the shipments were handled carefully." "Did you ever hear a railroad man testify that the shipments were roughly handled —No—Why? Because they do not want to be censured." "You doubtless have seen several of the railroad men in the court room, who know about the condition of the car and why did they not put them on the stand." "They were doubtless railroad inspectors who inspected this car, and if the condition of the car was not as our witness Holden stated—why did they not prove it to the contrary." The cases are now numerous in which judgments have been reversed by this court on account of similar arguments, and on the authority of these cases, which need not be cited, this judgment must be reversed, the evidence being conflicting.

In view of another trial, we call attention to the fact that the defects in the car described by witness Holden, referred to in the argument, were not alleged as a ground of recovery in the petition, and for this reason also the argument was inadmissible.

Reversed and remanded.

A. H. SNEED v. FRANK MCFATRIDGE ET AL.

Decided October 13, 1906.

1.—False Imprisonment—Sheriff—Liability of Sureties.

The liability of sureties on a sheriff's official bond is limited to his official acts, as distinguished from those in which his official character forms the pretense or color, not the authority. Hence the sureties on a sheriff's official bond are not liable for the arrest and imprisonment of a person by their principal without lawful authority.

2.—Same—Warrant of Arrest.

By the provisions of our Code of Criminal Procedure, article 238, a warrant of arrest issued by a magistrate other than a judge of the Supreme Court, Court of Appeals, District or County Court, can not be executed in any other county than the one in which it issues, unless endorsed by one of said judges or by some magistrate of the county in which the accused is found. Hence an arrest

in H. county, by virtue of a warrant of arrest issued by a justice of the peace in and for L. county, and not endorsed as above required, was unlawful, and an extra-official act of the officer making the arrest, for which his sureties would not be liable, but for which the officer himself would be.

3.—Same—Venue.

It appearing, from the allegations of plaintiff's petition, that the defendants, a constable of L. county and the sheriff of H. county, acted together in his unlawful arrest and imprisonment, an action for damages could be maintained against both of them in L. county.

4.—Unlawful Arrest—Continued Act.

An arrest by virtue of a void warrant is not excused, nor the detention of the prisoner made lawful, by taking him into the territory in which the warrant is effective.

Appeal from the District Court of Lamar County. Tried below before Hon. T. D. Montrose.

Hale, Allen & Dohoney, for appellant.—The warrant of arrest shown by the petition, having been issued by a justice of the peace in and for Lamar County, and not having been indorsed as required by law, was void in Harris County, and its attempted execution was illegal; and defendants having arrested and restrained appellant under said warrant, are liable to him for damages resulting from such unlawful arrest and restraint. Texas Code Crim. Proc., arts. 258, 259, 270, 271, 272; Ledbetter v. State, 5 S. W. Rep., 226; Wolf v. Perryman, 82 Texas, 114.

The court erred in sustaining the special exception of the defendants A. R. Anderson, H. Brashear, J. J. Sweeney and Frank Dunn, raising the question of privilege to be sued in the county of their residence, because said petition shows that defendant McFatridge resides in Lamar County, Texas, and that all of the defendants were acting together in the commission of the wrongful acts alleged; and that the illegal restraint alleged in pursuance of such common design, was partly in Lamar and partly in Harris County. Sayles' Texas Civil Statutes, art. 1194, subds. 4, 9.

Sturgeon & Moore, for appellees.—The true meaning and intent of plaintiff's petition is that a deputy under appellee, A. R. Anderson, sheriff of Harris County, arrested appellant without warrant or authority of law and caused him to be placed in the jail of Harris County, and there being no positive allegation in said petition that appellee, Anderson, personally participated in such illegal and unauthorized arrest, or advised or instigated such arrest and confinement or had any knowledge thereof, the petition failed to state a cause of action against him. Sayles' Civ. Stat., art. 4697; Maddox v. Hudgeons, 72 S. W. Rep., 415; Goodale v. Douglas, 24 S. W. Rep., 966.

Plaintiff's petition stated no cause of action against the sureties upon the official bond of appellee, Anderson, even though the petition be construed as alleging that Anderson personally had anything to do with the alleged illegal arrest of appellant, for the reason that the allegations of the petition are that such arrest was made without legal authority upon a warrant void on its face in Harris County where the arrest is alleged to have been made. Jones v. Hess, 48 S. W. Rep., 46; Henderson County v.

Richardson, 40 S. W. Rep., 38, and authorities there cited; Heidenheimer v. Brent, 59 Texas, 533; Hamilton v. Ward, 4 Texas, 362, 363; Maddox v. Hudgeons, 72 S. W. Rep., 416, and authorities there cited; McLendon v. State, 92 Tenn., 520.

Plaintiff's petition did not state a cause of action against appellee, Frank McFatridge. Arts. 271, 272, Code Crim. Procedure; Cabel v. Arnold, 86 Texas, 102.

Plaintiff's petition alleging the residence of defendants, Anderson, Brashear, Sweeney and Dunn to be in Harris County, and said petition not showing a joint cause of action against the defendant, McFatridge, and any one of said defendants, the court properly sustained said defendant's special exception raising the question of their legal right to be sued in the county of their residence. Kansas City P. & G. Ry. Co. v. Bermea Land & Lumber Co., 54 S. W. Rep., 324; Beauchamp v. Chester, 86 S. W. Rep., 1055; Bigham v. Talbot, 51 Texas, 453.

The court did not have jurisdiction of the person of the non-resident defendant because of any trespass committed upon the person of the plaintiff in Lamar County, because the allegations of plaintiff's petition affirmatively show that no such trespass was committed by any of the defendants in said county. Lasater v. Waits, 68 S. W. Rep., 500; McRea v. McWilliams, 58 Texas, 328.

TALBOT, ASSOCIATE JUSTICE.—Appellant Sneed brought this suit to recover of A. R. Anderson, sheriff of Harris County, Texas, and the sureties on his official bond, and of Frank McFatridge, as constable of Lamar County, Texas, damages for false imprisonment. All the appellees answered by general demurrer and general denial and A. R. Anderson and his sureties, Sweeney, Brashear and Dunn, in addition thereto, pleaded by special exceptions and in abatement their privilege to be sued in Harris County, where it was alleged they resided. The trial court sustained the general demurrer and special exceptions and appellant declining to amend, the suit was dismissed as to all the appellees and judgment to that effect and for costs entered against appellant, from which he has appealed.

The material allegations of appellant's petition are in substance; that on or about March 15, 1905, appellee, McFatridge, made and filed with A. B. Sims, a justice of the peace of Precinct No. 2, of Lamar County, Texas, a complaint or affidavit charging appellant with the offense of having bet at a game of dice in said precinct and county and not at a private residence; that on the same day the said justice of the peace issued a warrant for the arrest of appellant, directed to the sheriff, or any constable of Lamar County, Texas, which warrant appellee, McFatridge, sent to appellee, Anderson, together with a letter advising said Anderson where to find appellant, and directing and requesting that appellant be arrested and detained until McFatridge could go for him; that appellee Anderson and his deputies received said warrant and on or about May 22, 1905, said Anderson, acting through his deputy, D. W. Thompson, and in pursuance of the request of McFatridge, unlawfully arrested appellant in Harris County, Texas, and carried him in custody to the city of Houston, a distance of about twenty miles, and incarcerated him in the jail of said county. That appellant was restrained of his liberty and

confined in said jail until May 27, 1905, at which time said Anderson, through his deputy, turned appellant, together with said warrant, over to the said McFatridge in Houston, Harris County, Texas. That appellee, McFatridge, continued to restrain appellant of his liberty in said Harris County, and handcuffed him and brought him back to Lamar County in irons and was about to place and imprison him in the county jail at Paris when appellant prevailed upon him to telephone to appellant's friends and relatives at Petty, who made bond for his appearance to answer the charge preferred against him, whereupon he was discharged from custody. It was further alleged that appellee Anderson, through his deputies, in arresting and restraining appellant of his liberty, pretended to act under and by virtue of the warrant issued by the justice of the peace of Lamar County; that said warrant was not indorsed as required by law by any magistrate in Harris County, Texas, nor by any judge of this State so as to authorize its execution out of Lamar County, Texas, and was therefore void in Harris County, Texas. That after appellant's arrest in said Harris County appellee Anderson and his deputies failed and refused to carry appellant to the nearest justice of the peace or to any justice of the peace and failed and refused to give appellant an opportunity to give bond; that if such opportunity had been afforded him he could and would have given a lawful and satisfactory bond entitling him to his release. It was also alleged that the restraint and detention of appellant was without any commitment from any court; that appellee Anderson, after said illegal arrest, confined appellant in said Harris County jail until about May 26, 1905, when he telegraphed to appellee McFatridge advising him of the arrest and confinement; that at the time McFatridge received appellant in Harris County, Texas, from appellee Anderson he knew the said Anderson and his deputies had illegally arrested appellant and were illegally restraining him of his liberty by virtue of the warrant issued by said justice of the peace of Lamar County; and that the said Anderson knew the said McFatridge intended to and and would take appellant back to Lamar County, restraining him of his liberty, and turned him over to McFatridge for that purpose. It was then alleged that appellant, by reason of the acts of appellees, suffered great humiliation, mental anguish, pain, loss of time from his work and caused to incur traveling expenses, all to his damage in the sum of $5,100.

We think the general demurrer was well taken as to Sweeney, Brashear and Dunn, the sureties on appellee Anderson's official bond, but should have been overruled as to Anderson and McFatridge. It is well settled that the liability of sureties on a sheriff's bond is limited to his *official* acts. In treating of this subject Mr. Murfree, in his work on Sheriffs, sec. 46, says: "They (the sureties) are responsible for the manner in which he performs, and for his omissions to perform acts which it is his right and duty to perform by virtue of his office, *virtute officii;* but not for those in which his official character forms the pretense or color, not the authority." It is clear, as disclosed by the allegations of appellant's petition, that the act of appellee Anderson in arresting and detaining appellant, as charged, was not an official act of his, as contemplated by the rule of law stated. Our Code of Criminal Procedure, article 238, provides that "when a warrant of arrest is issued

by a magistrate other than a judge of the Supreme Court, Court of Appeals, District or County Court, it can not be executed in another county than the one in which it issues, unless indorsed by some one of said judges," in which case it can be executed anywhere in the State; or if it be indorsed by some magistrate of the county in which the accused is found, it may be executed in such county. The indorsement may be: "Let this warrant be executed in the county of ————"; or if the indorsement is by one of the judges above mentioned, it may be: "Let this warrant be executed in any county of the State of Texas." It is further provided that any other words expressing the same meaning as the indorsement prescribed will be sufficient, and that the same shall be dated and signed officially by the magistrate making it.

According to the allegations of appellant's petition, which, for the purposes of the demurrer, must be taken as true, the warrant of arrest under and by virtue of which appellant was apprehended and restrained of his liberty, was issued by a justice of the peace of Lamar County, Texas, and not indorsed as required by the statute to which we have referred. This being true, said warrant was absolutely void on its face in Harris County, and clothed the said Anderson with no authority whatever to make said arrest and detain appellant as charged. The alleged acts of Anderson being extra-official and without authority of law, the sureties on his official bond are not liable therefor and can not be made to respond in damages to appellant for the consequences thereof. (Ledbetter v. State, 5 S. W. Rep., 226; Jones v. Hess, 48 S. W. Rep., 46.)

Appellant's petition set up a good cause of action for false imprisonment against appellees Anderson and McFatridge and one upon which a suit could be maintained as to both of said parties in Lamar County. Its allegations are sufficient to show that in the arrest and detention of appellant the appellees, McFatridge and Anderson, were acting together; that if the act of taking appellant into custody was done by Anderson's deputies, the same was done with said Anderson's knowledge and consent and that appellant was afterwards detained and restrained of his liberty by the said Anderson himself; that the warrant upon which the arrest was made was not indorsed as required by the statute above mentioned, so as to authorize its execution outside the limits of Lamar County, and hence, as before said, void on its face in Harris County. It further showed that appellant and the warrant upon which he had been arrested, were turned over to McFatridge in Harris County and appellant by him carried back to Lamar County; that appellee Anderson knew when appellant was delivered to McFatridge, that McFatridge would continue to restrain appellant of his liberty and intended to and would take him back to Lamar County and that he so delivered him into the custody of McFatridge for that purpose. According to these allegations the arrest of appellant and his detention up to the time of his release in Lamar County was without any legal authority, and all persons instrumental in procuring such arrest and participating in such detention were trespassers and liable to an action for false imprisonment. In speaking of the liability of wrongdoers for the acts of each other, our Supreme Court in the case of Wolf v. Perryman,

82 Texas, 112, says: "The general rule is, both in civil and criminal cases, that each is responsible for the acts of the others done in pursuance of the mutual understanding or in furtherance of the common purpose, at least until the termination of the enterprise." In his work on Torts (2d ed.), p. 153, Judge Cooley says: "Where several persons unite in an act which constitutes a wrong to another, intending at the time to commit it, or doing it under circumstances which fairly charge them with intending the consequences which follow, it is a very reasonable and just rule of law which compels each to assume and bear the responsibility of the misconduct of all." If the allegations of the petition are true it is quite clear this case falls within the rules of law above announced, and appellees Anderson and McFatridge are liable for all the injurious consequences to appellant, which resulted from their alleged wrongful acts, and their liability is not limited to acts done in Harris County. Neither can escape liability for the detention of appellant in Lamar County by reason of the official character of McFatridge and the validity of the warrant of arrest in that county. The alleged trespass committed by McFatridge in detaining appellant and taking him back to Lamar County in irons and threatening to place him in jail there was not a separate and independent trespass committed by him outside of and beyond the understanding between him and Anderson, but was, according to the allegations of the petition, a continuance of the wrong and illegal imprisonment begun in Harris County and contemplated, authorized and consented to by Anderson and done in furtherance of the common design of both. Wolf v. Perryman, supra; Mandeville v. Guernsey, 51 Barb., 99, affirmed by the Court of Appeals, 50 N. Y., 669, without a written opinion, is in point. The plaintiff in that case had been indicted in Tioga County, in the State of Pennsylvania for forgery. A valid warrant for his arrest in that State had been issued and placed in the hands of the defendant for execution. The plaintiff was in the State of New York and by defendant arrested there, by virtue of said warrant and carried back to Tioga County, Pennsylvania. In a suit by plaintiff for false imprisonment the trial court was requested by the defendant to charge the jury that in estimating the damages they should not take into consideration the continued imprisonment of plaintiff after he reached the county of Tioga. This charge was refused and on appeal its refusal was assigned as error. The Supreme Court of New York in passing upon the question, said: "The imprisonment in Pennsylvania was a continuance of the wrong which was commenced by the unauthorized seizure and imprisonment in this State. It was not justified by any process which was insufficient to justify the original arrest. A person who has arrested a party without process or on void process wrongfully can not detain him on valid process until he has restored such party to the condition he was in at the time of his arrest, at least to his liberty. The law will not permit him to perpetrate a wrong for the purpose of executing process, nor to use process for the purpose of continuing an imprisonment commenced without authority and by his wrongful act." This principle is also enunciated in the English cases of Hooper v. Lane, 6 H. L. Cas., 443. Egginton's case, 2 Ell. & Bl., 728, is one which meets the approval of this Court, and so far as we are informed,

is not contravened by any decision of the courts of this State. The case of Cabell v. Arnold, 86 Texas, 102, cited by counsel for appellees, does not announce a contrary doctrine. In that case it was held, in effect, that where a valid warrant for an arrest was issued and placed in the hands of a United States Marshal, the fact that his deputy *made the arrest within the marshal's district* without having the warrant in his possession did not render the principal civilly liable to the person arrested. In that case neither the sufficiency of the warrant, nor the right to execute it in the county where the arrest was made, was questioned. The contention was that the arrest and detention of the plaintiff until he was placed under the control of the marshal were illegal. Judge Stayton said: "Authority to make the arrest existing, the manner in which that power was exercised ought not to be held ground for civil action, unless therefrom hurt resulted to plaintiff, which would not necessarily have followed, had the exact procedure contemplated by the statute been pursued." Having held that inasmuch as a valid warrant, which might have been legally executed in the county where the arrest was made, was in the hands of the marshal and the arrest by his deputies, although irregular, not illegal because not in possession of such warrant, the court did not decide whether or not, had the arrest been without authority of law, the detention of the plaintiff by the marshal after the plaintiff was placed under his control was unlawful. That question was not involved and not passed upon.

We believe the trial court correctly ruled upon the general demurrer as to the appellees Sweeney, Brashear and Dunn, but erred in sustaining said demurrer and the special exceptions as to appellees Anderson and McFatridge, and as to the former the judgment of the court below is affirmed and as to the latter it is reversed and the cause remanded for trial.

Affirmed in part and reversed and remanded in part.

Writ of error refused.

W. P. H. MCFADDIN ET AL. v. D. R. SIMS.

Decided October 16, 1906.

1.—Deposition—Caption—Certificate—Identifying Case.

When depositions are attached to interrogatories filed in a case, and were taken in obedience to a commission issued out of the court in which the case is pending, and the caption to the interrogatories gives the correct style and number of the case, and the interrogatories and commission both show the court in which said case was pending, and the certificate shows that the deposition was taken in answer to said interrogatories, the case in which the deposition was taken is sufficiently identified.

2.—Same.

The certificate of an officer taking depositions should show that the answers of the witness were signed and sworn to by the witness before the officer who took the deposition.

3.—Reconvention—Burden of Proof.

When the defendant in an attachment suit reconvenes for damages, the burden is upon him to show that the attachment was wrongfully sued out.

4.—Pleading Evidence.

The allegations of defendant in his answer, as to his experience as a rice farmer and his knowledge of the cost of making a crop of rice, were, in effect, a pleading of evidence, and should have been stricken out on exception.

5.—Damage to Crop—Measure.

The measure of damage to a crop of rice by failure to furnish water to irrigate the same would be the difference between the value of the crop actually raised, less the cost of raising, harvesting and marketing the same, and the value of the crop which would have been raised if properly irrigated, less the cost of raising, harvesting and marketing the same.

6.—Loss of Attached Property—Liability.

The plaintiff in attachment would not be liable for the value of a horse, seized by virtue of the attachment, which died while in the possession of the sheriff, unless the attachment was wrongfully sued out, and this though the negligence of the sheriff caused the death of the horse.

7.—Damage to Crop—Allegation—Proof.

Allegations by defendant that plaintiffs wrongfully took possession of the crop, and by carelessness damaged the same, will not authorize a recovery upon evidence that plaintiffs took possession of the crop by and with the consent of the defendant for the purpose of gathering it, but damaged the same by negligent methods.

Appeal from the District Court of Jefferson County. Tried below before Hon. L. B. Hightower, Jr.

Greers, Nall & Neblett, for appellant.—That as to the plea in reconvention the burden of proof was on the defendant. Rabb v. White, 45 S. W. Rep., 850; Williams v. Kane, 55 S. W. Rep., 974; Dwyer v. Testard, 1 W. W. Civ. Cases, sec. 1230; Michigan, etc., Co. v. Waco, etc., Co., 54 S. W. Rep., 357; Armstrong v. Ames, 43 S. W. Rep., 302; Frank v. Tatum, 26 S. W. Rep., 902; Blum v. Strong, 71 Texas, 321; First Nat. Bank v. Houts, 85 Texas, 73; Hilliard v. Wilson, 76 Texas, 184.

That the deposition of Nolte should have been suppressed. Sabine, etc., Ry. Co. v. Brousard, 69 Texas, 621; Bush v. Barron, 78 Texas, 8; Wallace v. Byers, 38 S. W. Rep., 228; Southern Pac. R. R. Co. v. Royal, 23 S. W. Rep., 316; Patton v. King, 26 Texas, 687; Emmerson v. McKenna, 16 S. W. Rep., 419.

The finding of the jury must be supported by more than a mere scintilla of evidence, and when the evidence is overwhelming on one side and against the verdict of the jury, it is the duty of the trial court to set aside the verdict on motion for new trial. Chandler v. Meckling, 22 Texas, 42; Galveston, H. & S. A. Ry. v. Bracken, 59 Texas, 75; Dimmit v. Robbins, 74 Texas, 441; Missouri Pac. Ry. v. Somers, 78 Texas, 459; Zapp v. Michaelis, 58 Texas, 270; Short v. Kelly, 62 S. W. Rep., 944; Houston & T. C. Ry. Co. v. Loeffler, 59 S. W. Rep., 652.

When live stock is attached and one head thereof dies without any negligence or fault on the part of the sheriff having the stock in custody, or on the part of the plaintiff in attachment, the alleged or proved value of such live stock so dying can not be charged against the plaintiff in attachment. Girard v. Moore, 86 Texas, 675; Trawick v.

Martin Brown Co., 74 Texas, 525; Tynberg v. Cohen, 24 S. W. Rep., 314.

Facts not alleged can not form basis of a recovery, and where the proof offered by the party making the allegation contradicts the allegation, no recovery can be had on other facts not alleged. Texas & P. R. R. v. French, 86 Texas, 96; Loving v. Dixon, 56 Texas, 75; Bruce v. Kock Dreyfus & Co., 94 Texas, 195.

Hardy & Hardy, for appellee.—The record of the notary public taking the depositions of the witness Harry Nolte, in the caption, the certificate and other forms of his actual caption, showed with sufficient certainty to the court that the depositions were the answers of the witness Harry Nolte to the interrogatories propounded, sworn to and subscribed by the said witness before said officer taking the depositions in said cause No. 3707, W. P. H. McFaddin et al. v. D. R. Sims, in the District Court of Jefferson County, Texas. Neill v. Coddie, 26 Texas, 290; Ballard v. Perry, 28 Texas, 362; Houston & T. C. Ry. Co. v. Larkin, 64 Texas, 457; Missouri, K. & T. Ry. Co. v. Hennesey, 20 Texas Civ. App., 320.

PLEASANTS, ASSOCIATE JUSTICE.—Appellants W. P. H. McFaddin, V. Wiess and W. W. Kyle, composing the firm of McFaddin, Wiess and Kyle, brought this suit against the appellee D. R. Sims on an account for rents and for supplies furnished and advances made the defendant while he was a tenant on plaintiffs' farm, the balance claimed to be due on said account being $2,272.23. At the time the suit was filed plaintiffs applied for and procured the issuance of an attachment which was levied upon 23 mules and 1 horse belonging to the defendant. The mules were sold by order of the court pending the trial of the cause. The horse died while in the custody of the sheriff or his agent.

The answer of the defendant admits a portion of plaintiffs' account to be correct but pleaded in offset thereto several items of indebtedness claimed to be due him by plaintiffs. He also claimed damages on account of the negligent and improper handling of defendant's rice by the plaintiffs and on account of the failure of plaintiffs to comply with their contract to furnish sufficient water to properly irrigate defendant's rice, and further claimed damages both actual and exemplary for the alleged wrongful suing out of the attachment.

A trial by jury resulted in a verdict and judgment in favor of plaintiffs for the sum of $357.03 with foreclosure of the attachment lien.

The first and second assignments of error complain of the ruling of the trial court in not sustaining plaintiffs' motion to suppress the depositions of the witness Harry Nolte. The grounds of this motion are, in substance, that neither the caption of the deposition nor the certificate of the officer by whom the deposition purports to have been taken, sufficiently identifies the case in which it was taken, it not appearing therefrom in what court the case is pending or that it is pending in any court; that the certificate of the officer before whom the depositions purport to have been taken does not show that the answers of the witness were sworn to and subscribed by him before said officer;

and that the answers of the witness to some of the cross-interrogatories propounded by plaintiff are evasive.

The bill of exceptions shows that the caption to the depositions was as follows: "Answers of Harry Nolte to the direct and cross-interrogatories propounded in the case of W. P. H. McFaddin et al. against D. R. Sims, No. 3707, the said Harry Nolte being first duly sworn to make true answers to said direct and cross interrogatories, made his answers as follows." The certificate to the deposition was as follows: "State of Kansas, County of Montgomery—ss. I, the undersigned, Walter Zeigler, a notary public in and for the county of Montgomery, State of Kansas, do hereby certify that Harry Nolte was by me first duly sworn to make true answers to the above and foregoing direct and cross interrogatories, and that his answers as given were reduced to writing and that the same were subscribed and sworn to by said witness. In testimony whereof I have hereunto set my hand and notarial seal this the 22d day of February, 1905. Walter Zeigler, Notary Public. Seal."

These depositions were attached to the direct and cross interrogatories filed in this case and were taken in obedience to a commission issued out of the District Court of Jefferson County in which the suit was pending. We think the caption and certificate of the officer sufficiently identifies the case in which the depositions were taken. The caption gives the correct style and number of the case. The interrogatories and commission both show that the case mentioned in the caption was pending in the District Court of Jefferson County, Texas, and the certificate shows that the depositions were taken in answer to the interrogatories which were filed in said case. A substantial compliance with the statute is all that is required. (Carroll v. Welch, 26 Texas, 147; Houston & T. C. Ry. Co. v. Larkin, 64 Texas, 457.)

A different question is presented by the second objection to the deposition. Article 2284, Revised Statutes, requires the officer taking the deposition to certify that the witness signed and swore to the answers before him. This fact does not appear from the certificate above set out either in express words or by necessary implication from the language used. The certificate recites that the witness was sworn by the officer before the interrogatories were propounded to him, and that his answers were reduced to writing and subscribed and sworn to by him. This is not a statement as required by the statute that the answers of the witness were signed and sworn to by him before the officer. The failure of the certificate to show that the depositions were signed and sworn to by the witness before the officer was a fatal defect and the motion to suppress on this ground should have been sustained. (Chapman v. Allen, 15 Texas, 278; Carroll v. Welch, 26 Texas, 147; Bush v. Barron, 78 Texas, 8.)

We agree with the trial court that the answers of the witness to the cross interrogatories considered as a whole are sufficiently full and show no disposition on his part to evade answering any of the questions propounded to him.

The testimony of this witness was material to the defendant upon one of the main issues in the case and the error of the court in admit-

ting the deposition over the objection of plaintiff requires a reversal of the judgment.

It is unnecessary to discuss the remaining assignments in detail, but for the guidance of the court upon another trial we will in a general way dispose of the questions of law presented by the record.

The burden of proof upon the issue of the wrongful suing out of the attachment was upon the defendant. While it may not have been proper under the evidence to have given any charge upon the burden of proof on this issue it was clearly erroneous to charge that such burden was upon the plaintiffs. (Blum v. Strong, 71 Texas, 321; First Nat. Bank v. Houts, 85 Texas, 73; Bobb v. White, 45 S. W. Rep., 850.)

The allegations in the defendant's answer, that he was an experienced and practical rice farmer acquainted with the growth of rice in its various stages and knows the cost of marketing and harvesting the same and the probable yield of the land rented by him, were immaterial and irrelevant as pleading, and were in effect a pleading of evidence which tended to qualify defendant as an expert and were for that reason improper and should have been stricken out.

The measure of defendant's damage for the failure of plaintiffs to furnish sufficient water to irrigate his crop would be the difference between the value of the crop raised by him less the cost of raising, harvesting and marketing same, and the value of the crop he would have raised if it had been properly watered less the cost of raising, harvesting and marketing. (Dunlap v. Raywood Co., 16 Texas Ct. Rep., 86.)

The plaintiffs would not be liable for the value of the horse which died while in possession of the sheriff unless the attachment was wrongfully sued out, notwithstanding the death of the horse may have been due to the negligence of the sheriff or his agent, and if the item of $125 found by the jury in favor of defendant was intended as a finding for the value of the horse it can not be sustained, because the jury further found that the attachment was not wrongfully sued out.

The allegations of defendant's answer that the plaintiffs forcibly, wrongfully and without his consent entered upon the premises and took possession of his crop and proceeded to gather same and by the careless and reckless manner in which they handled the crop, wasted, destroyed and damaged it to the extent of $2,775, would not authorize a recovery upon evidence showing that plaintiffs took possession of the crop and undertook to gather it with the consent of the defendant, but by their negligent method of gathering it defendant was damaged as alleged. The cause of action alleged is for damages growing out of a tort while that shown by the evidence would arise from a negligent performance of a contract. The charge given by the court upon this issue authorized a recovery upon a different cause of action from the one alleged, and therefore should not have been given.

In view of another trial we refrain from passing upon the assignments which assail the verdict on the grounds that it is unsupported by the evidence and is against the great weight and preponderance of the evidence.

For the errors indicated the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

Houston & Texas Central Railroad Company v. H. S. and W. H. Ramsey.

Decided October 16, 1906.

1.—Person Walking on Railroad Track—Duty of Engineer.

An engineer is not required to use any means to stop his train as soon as he discovers a man on the track; he has a right to presume that the man will leave the track in time to avoid injury. It is only after the engineer has good reason to believe that the man is unconscious of his peril, or unable to avoid the danger, that he is required to use all the means in his power to stop the train.

2.—Same—Negligence—Evidence.

Evidence considered, and held sufficient to support a finding that an engineer was negligent in failing to use the means at his command to avoid injuring one upon the railroad track.

3.—Evidence of Experiments.

Evidence of experiments made by plaintiffs for the purpose of showing at what point on the track the engineer could have seen the deceased considered, and held admissible. Evidence of this character is admissible when the experiments are made under circumstances substantially similar, in all material particulars, to those obtaining at the time of the occurrence with regard to which the evidence is offered.

Appeal from the District Court of Brazos County. Tried below before Hon. J. C. Scott.

Baker, Botts, Parker & Garwood and *Andrews, Ball & Streetman,* for appellant.—It was error to admit evidence of an experiment made by the witness for the purpose of proving that the engineer could have seen deceased from a certain point, when the circumstances and surroundings in the experiment were wholly different from those attending the engineer at the time of the injury to said deceased. 12 Am. & Eng. Enc. of Law, 406; Chicago & A. Ry. v. Logue, 47 Ill. App., 292; Lake Erie & W. Ry. v. Mugg, 132 Ind., 168; Alabama, G. S. Ry. v. Burgess, 22 So. Rep., 171; Smith v. Reeder, 28 Pac. Rep., 890; Morton v. State, 71 S. W. Rep., 282; Missouri Pac. Ry. v. Moffatt, 44 Pac. Rep., 607.

Employes in charge of running trains do not owe a person, whose presence on a railroad track is under such circumstances as that he would be considered a trespasser thereon, the duty of keeping a lookout for his safety. They are authorized to assume that a person upon the track is in possession of all his faculties, and will leave the track in time to avoid injury, and to operate the train on this assumption until they realize that he will not do so. Missouri, K. & T. Ry. Co. v. McGlamory, 89 Texas, 635.

Doremus & Butler and *C. H. Steele,* for appellees.—The court did not err in admitting the evidence of an experiment made for the purpose of proving that the engineer could have seen deceased from the railroad crossing south of the section house down to the point where deceased was struck. Olivaras v. San Antonio & Aransas Pass Ry. Co., 8 Texas Ct. Rep., 979; St. Louis, M. & S. E. Ry. Co. v. Shannon,

88 S. W. Rep., 851; Ayres v. Wabash Ry. Co., 88 S. W. Rep., 608-610; Burg v. Chicago, R. I. & P. Ry. Co., 57 N. W. Rep., 683.

REESE, ASSOCIATE JUSTICE.—On or about August 3, 1903, John Ramsey came to his death by being run over by an engine pulling a regular passenger train of the Houston and Texas Central Railroad Company.

Deceased was at the time riding on a railroad velocipede going south from the watch-tower at the crossing of the International and Great Northern Railroad and the Houston and Texas Central Railroad, just below College Station. The engine which struck and killed him was attached to the regular passenger train going south. The train was due at College Station at 7 o'clock p. m. and arrived there about ten minutes later. The accident occurred between one and two miles south of that point.

This suit is brought by the father and mother of the said John Ramsey to recover damages for his death. It is alleged, in substance, that the engineer in charge of the engine discovered the presence of deceased upon the track, and his peril from the approaching train, in time to stop the train by the use of the means under his control, with safety to the passengers and train, and thus avoid injuring the deceased, and that he failed to do so, but recklessly and willfully ran the deceased down with his engine.

Defendant answered by general demurrer, general denial, pleas of contributory negligence and specially denied that the death of deceased Ramsey was caused by the negligence of defendant in that defendant after the discovery of the peril of deceased used every means in its power consistent with the safety of the train to avoid the injury to deceased.

Upon trial before a jury there was a verdict for plaintiffs for $2,000, and from the judgment defendant prosecutes this appeal.

It is apparent from the record that the deceased was a trespasser upon appellant's track at the time he was killed and that appellant owed him no duty except to use all the means in its power, consistent with the safety of the train, to avoid injuring him, after his peril was discovered. (Texas & Pac. Ry. v. Breadow, 90 Texas, 31; Texas & Pac. Ry. v. Staggs, 90 Texas, 458.) This was recognized by the trial court in the submission of the case to the jury and is not controverted by appellees.

The issues were, (1) did Wilson, the engineer in charge of the engine, discover the peril of John Ramsey in time to have avoided the injury to him by the use of all of the means under his control for stopping the train, consistent with the safety of the train; and (2) did the engineer, after actually discovering the peril of Ramsey, use all of the means under his control for stopping the train, consistent with its safety.

The first two assignments of error complain of the action of the trial court in overruling appellant's motion for a new trial on the grounds that, (1) the verdict is unsupported by the evidence and contrary to the uncontradicted evidence, and (2) that it is contrary to the overwhelming weight and preponderance of the evidence and manifestly the result of passion and prejudice on the part of the jury.

At the time of the accident the train was running not less than thirty-five miles, and probably forty-five miles an hour on a straight track with nothing to obstruct the view between the engineer on the engine and Ramsey on the velocipede. The wind was from the south, the engine going south and the time was a little after sundown. Some of the witnesses place it earlier, but the testimony most probably true, being that of the engineer as to the scheduled time of the arrival of the train at College Station at 7 o'clock p. m., which is not disputed, and the fact that on the day of the accident the sun set at 6:56 o'clock p. m., showed the time to have been a little after sunset. The engineer further testified that he arrived at College Station eleven minutes late, which is not disputed by the evidence, and that he was in consequence running fast to make up the time. One of appellees' witnesses, however, a passenger on the train, fixes the time as early as 3 o'clock p. m. and the other witnesses vary in their testimony from that time to about sundown.

There was a road crossing which was shown to be 999 yards north from the point where Ramsey was struck. South of that point is an elevation in the track which the engineer calls a "hog-back," the top of this hog-back being, according to a plat introduced in evidence showing these distances, the correctness of which is not disputed, 750 yards from where Ramsey was struck. The engineer testified that as soon as he saw the object on the track ahead of him he blew the whistle and shut off steam, but did not discover, at that time, that the object was a man; that as soon as he saw it was a human being he made an effort to stop the train, that he applied the emergency with full force, being all the power he had, and that his whole attention was directed to nothing else but trying to stop the train and give the alarm for the man to get off the track.

The engineer was not required to resort to any means to stop his train as soon as he saw that there was a man on the track. He had a right to presume that he would leave the track in time to avoid the danger. It was only after he had good reason to believe that Ramsey was unconscious of his peril or unable to extricate himself that he was required to use all the means in his power to stop the train. The testimony of the engineer himself shows that he discovered that the object on the track was a man "just after passing the hog-back" the top of which, as we have seen, was 750 yards from where Ramsey was struck. He also testified that as soon as he discovered that it was a man on the track he at once put in motion all the means at his command to stop the train and began to blow the whistle as rapidly as it could be done. From this the jury might reasonably conclude that as soon as the engineer discovered that the object, which he had seen some distance back, was a man he realized his peril and the necessity for a resort to the extraordinary means provided to stop the train. This discovery was made, as we have seen, according to the testimony of the engineer "just after passing the hog-back." This language, it is true, is indefinite and does not fix the point with accuracy where the discovery of Ramsey's peril was made, but from it the jury might reasonably conclude that it was at such distance from Ramsey that by the

prompt use of all of the means at his command the engineer could have either stopped the train before reaching him, or at least so checked its speed that he could have gotten off the track in time to escape injury. The testimony as to the distance within which the train could have been stopped by the use of the emergency appliances, even without reversing the engine, varied from 900 feet to 1,300 feet, that is from 300 yards to 433 yards, the engineer himself testifying that it could have been stopped in 400 yards. Four hundred yards from where Ramsey was struck was 350 yards from the top of the "hog-back." It must be concluded from the testimony of the engineer that the rapid whistling from the engine began when he discovered Ramsey's peril, and there was evidence from some of the passengers that the engine ran 300 or 400 yards after the whistling began before striking Ramsey. One witness says he determined the distance at the time by counting the telegraph poles from the point when the whistling began to where Ramsey was struck and found it to be 15 telegraph poles, which are 100 feet apart.

There is a sharp conflict between the testimony of the engineer, the only witness for appellant, and the other witnesses, some of them passengers on the train, and others on the ground at or near the place of the accident, as to what efforts were made to stop the train. Some of the testimony is positive to the effect that there was no check in the speed of the train until Ramsey was struck. Passengers on the train testified that they could not perceive any check in the speed, which was very great. It seems not to be disputed that the train ran 265 yards after striking Ramsey before stopping. This was only 35 yards less than was required to stop the train according to some of the evidence, and only 133 yards less than was required according to the greatest estimate made by the engineer himself. It is a reasonable inference from the testimony of the engineer himself that he saw Ramsey and realized his peril at a greater distance than this. It is true that the engineer testifies in the strongest terms that as soon as he saw that it was a human being on the track he at once used all the means at his command to attract his attention and also to stop the train, using the air brakes upon the wheels of the engine and cars to their fullest capacity, but the effect of the testimony of appellees' witnesses is to contradict this and to show that, in fact, no effort was made to stop the train until the man was struck, and the distance the train ran after he was struck tends strongly to corroborate them.

In this state of the evidence we can not say that the verdict is unsupported by the evidence, or is so contrary to the overwhelming weight and preponderance of the evidence as to justify the conclusion that it is the result of passion or prejudice and not of a fair consideration of the evidence by the jury. The assignments of error presenting these propositions must be overruled.

On the trial of the cause appellees offered certain evidence of experiments made to test how far a man could be seen on the track south of the road crossing by persons standing on the crossing. The experiments were made in the afternoon, one about 3:30 o'clock and the other late in the afternoon, the exact time not being stated. In the one case a man about six feet high and in his shirt sleeves, wearing a white

shirt, was placed on the track about where Ramsey was killed and the witnesses took their positions on the track at the road crossing. This road crossing is about 1,000 yards from the point where the man was placed. The witnesses stated that the man could be plainly seen at the point where he was first placed, and that as he came up the track to where the witnesses stood at the crossing he could be plainly seen every foot of the way. The other experiment was made under substantially the same circumstances, the witness being at the crossing and watching two persons walking down the track, who were known by the witness to be there, the result being the same. Appellant objected to the introduction of this testimony on the ground that it was immaterial and irrelevant, in that the circumstances under which the experiments were made were entirely different from those prevailing at the time of the accident insofar as they affected the ability of the engineer to see Ramsey. That in the one case the engineer was sitting in the cab of his engine travelling at the rate of about 45 miles an hour against the wind, and Ramsey sitting on a railroad velocipede on the track going from him, the time being about or after sundown, and the engineer not knowing or expecting the presence of Ramsey on the track. In the cases of the experiments, the time was in the afternoon, the object with which the tests were made was in each case men standing upright on the track at a point where the witnesses knew they were, the witnesses themselves standing on the ground some three or four feet lower than the engineer in his cab. The purpose of the testimony, and the only purpose for which it was admissible, was to show at what point the engineer became aware of the peril of Ramsey.

Evidence of this character is admissible when the experiments are made under circumstances substantially similar in all material particulars to those obtaining at the time of the occurrence with regard to which the evidence is offered. (12 Am. & Eng. Ency. of Law, p. 406 et seq. and cases cited.) Under this rule a majority of the court are of the opinion that the evidence in question was admissible. The writer of this opinion is inclined to differ from this conclusion, but holds that the error, if any, was harmless and could not have influenced the jury or affected the verdict. Justice Pleasants concurs in the view that if not admissible the error was harmless.

Under the instructions of the court the jury could only have considered the evidence as bearing upon the question as to where the engineer was, with reference to Ramsey, at the time he first actually became aware of his peril from the approaching train. Taking into consideration the engineer's own testimony on this point, which has been heretofore shown, I do not think the evidence objected to was calculated to influence their finding on this issue notwithstanding that was its purpose, and hence the admission of the evidence does not constitute reversible error. I agree with the majority of the court that the assignments of error presenting these objections should be overruled.

Other assignments of error in the record complain of the charge of the court and of the action of the court in refusing instructions requested by appellant. None of these assignments can be sustained. The court's charge, together with the instruction given at the request

of appellant, contains a clear and comprehensive statement of the law applicable to the issues presented by the pleadings and the evidence.

We find no error in the record requiring a reversal of the judgment and it is therefore affirmed.

Affirmed.

Writ of error refused.

TEXAS & PACIFIC RAILWAY COMPANY v. A. J. TURNER.

Decided October 17, 1906.

1.—Common Carrier—Negligence—Pleading.

In an action against a carrier for failing to deliver goods received for transportation, to which defendant answered that they were destroyed by fire, without its negligence, a supplemental petition alleging that their destruction was due to defendant's negligence was not subject to special demurrer for failure to show in what the negligence consisted, such pleading being, in effect, only a denial of the matters alleged in defense.

2.—Carrier—Action by Consignee.

The consignee, though not the owner of the goods lost, had such interest in them under the contract for shipment as entitled him to maintain action for their value.

Error from the District Court of Cass County. Tried below before Hon. P. A. Turner.

The value of the goods and the damages were laid at $845. The original petition did not allege negligence, but failure of defendant, a common carrier, to comply with its contract to transport and deliver. Defendant plead that the goods were destroyed by fire without negligence on its part, and plaintiff, by supplemental petition alleged that such destruction was due to defendants negligence. To this pleading plaintiff specially excepted because it failed to show in what the negligence consisted or state any facts amounting to negligence, and the exception was overruled. Goods to the value of $27 were admitted by plaintiff to belong to others.

W. T. Armistead, for plaintiff in error.—Where a special demurrer is urged to a general charge of negligence in the pleading of the opposite party it is the duty of the party to set out such negligence in full so as to give notice of what acts or omissions he relies on to establish such negligence. Murray v. Gulf, C. & S. F. Ry. Co., 73 Texas, 4; Morrison v. Insurance Co. of North America, 69 Texas, 353; Gulf, C. & S. F. Ry. Co. v. Fox, 6 S. W., 574.

The court erred in rendering judgment for the plaintiff for the amount of the goods which the plaintiff swore did not belong to him in the sum of about $27.

O'Neal & Allday, for defendant in error.

EIDSON, ASSOCIATE JUSTICE.—This is a suit brought by the defendant in error in the court below against the plaintiff in error to

recover damages on account of the loss of certain goods shipped by the defendant in error from Loreta, Colorado, to Atlanta, Texas. The case was tried by the court below without a jury, and judgment was rendered in favor of the defendant in error.

There was no error in the action of the court below in overruling plaintiff in error's special exception to defendant in error's supplemental petition. The original petition stated a good cause of action as against a general demurrer, and it was not excepted to specially, and the supplemental petition was simply a reply to and a denial of the matters set up in plaintiff in error's answer in avoidance of the cause of action set up by defendant in error in his original petition.

Plaintiff in error's second assignment of error is overruled. The defendant in error being the consignee of the goods would have such an interest in them as would entitle him to sue for them.

The third assignment of error is overruled, as in our opinion the testimony in the record is sufficient to support the amount of the judgment of the court below.

The judgment of the court below is affirmed.

Affirmed.

Application for writ of error dismissed for want of jurisdiction.

W. P. WILLIAMS ET AL. v. DALLAS, CLEBURNE & SOUTHWESTERN RAILWAY COMPANY.

Decided October 17, 1906.

Written Contract—Varying by Parol.

Defendants who had agreed in writing to pay money on condition of the building of a railroad to their town and the location of its depot within certain specified limits could not defeat recovery thereon by showing that they signed it relying on representations that the depot would be located on a particular lot within those limits, which was not done.

Appeal from the County Court of Johnson County. Tried below before Hon. J. D. Goldsmith.

S. C. Padelford and *Walker & Baker,* for appellants.—A writing never merges fraud; it can always be established by parol testimony that a written contract was procured by fraud; and when the evidence established the fact that a written contract was procured by fraud, then under the law, such a contract is void and not obligatory upon the makers. Chicago, T. & M. Ry. Co. v. Titterington, 84 Texas, 218; Henderson v. San Antonio & M. G. Ry. Co., 17 Texas, 560; Gulf, C. & S. F. Ry. Co. v. Jones, 63 Texas, 524; History Co. v. Flint, 4 Texas App. Civ., 374; Gulf, C. & S. F. Ry. Co. v. Jones, 82 Texas, 156; Miller v. Gulf, C. & S. F. Ry. Co., 65 Texas, 659; Gulf, C. & S. F. Ry. Co. v. Pittman, 4 Texas Civ. App., 171; Barrett v. Featherstone, 89 Texas, 578; McFarland v. Lyon, 4 Texas Civ. App., 589; Collinson v. Jeffries, 21 Texas Civ. App., 655.

The intent with which the promises were made and subsequently violated, was a question for the jury, and where there was evidence that the promises were made and that they were subsequently disregarded, the question of fraud should have been submitted to the jury. Chicago, T. & M. Ry. Co. v. Titterington, 84 Texas, 218; Henderson v. San Antonio & M. G. Ry. Co., 17 Texas, 560.

Oral evidence is admissible to show that a written contract was to take effect only on the happening of a certain condition, and that a contract was executed to be and to become effective only on a certain condition. Burke v. Dulaney, 153 U. S., 228; Ware v. Allen, 128 U. S., 590; Wilson v. Powers, 131 Mass., 539; McFarland v. Sikes, 54 Conn., 250; Gibbons v. Ellis, 83 Wis., 434; Brewer v. Woodward, 41 Am. Rep., 857; Merchants Nat. Bank v. McAnulty, 31 S. W. Rep., 1091; Humphries v. Richmond & M. Ry. Co., 13 S. E. Rep., 985; Black v. Shreve, 13 N. J. Eq., 455; Slocum v. Bracy, 43 Am. St. Rep., 499; Cuthrell v. Cuthrell, 101 Ind., 375; Westeman & Krumweide, 15 N. W. Rep., 255; Smith v. Mussetter, 59 N. W. Rep., 995; Bissenger v. Guiteman, 53 Tenn., 277.

W. Joe Gray, Brown & Bledsoe and *Ramsey & Odell,* for appellee.—The terms of a written contract, known to and understood by the party executing the same, can not be varied, contradicted, limited or added to by parol testimony. Wooters v. International & G. N. Ry. Co., 54 Texas, 294; Faires v. Cockerell, 29 S. W. Rep., 672; Gulf, C. & S. F. Ry. Co. v. Richards, 32 S. W. Rep., 96; Kramer v. Wolf Cigar Stores Co., 15 Texas Ct. Rep., 305; Greenleaf on Evidence, 275; 17 Cyc., 567.

Even though it had been represented to the appellants prior to the execution of the contract sued on that the depot of the appellee would be located on the Pearce lot, they signed a contract providing that it might be located elsewhere, with full knowledge of its terms, and all prior representations or statements were therefore merged into and will be controlled by the terms of the written contract. Wooters v. International & G. N. Ry. Co., 54 Texas, 294; Faires v. Cockerell, 29 S. W. Rep., 672; Bowen v. Hatch, 34 S. W. Rep., 330; Greenhill v. Hunton, 69 S. W. Rep., 440; San Antonio & A. P. Ry. Co. v. Busch, 21 S. W. Rep., 164; Lanius v. Shuler, 13 S. W. 614; Gulf, C. & S. F. Ry. Co. v. Richards, 11 Texas Civ. App., 102; Hopkins v. Woldert Grocery Co., 66 S. W. Rep., 63; Jackson v. Chemical Nat. Bank, 46 S. W. Rep., 295; Gulf, C. & S. F. Ry. Co. v. Fenn, 76 S. W. Rep., 599; Kramer v. Wolf Cigars Co., 15 Texas Ct. Rep., 305; 1 Greenleaf on Evidence, sec. 275; Ewing v. D. C. & S. W. Ry. Co. (Decided by C. C. A. for 5th Dist. on June 30, 1906, without written opinion).

Where a written contract is complete, though general in its nature it is not limited or added to by parol testimony. Ewing v. D. C. & S. W. Ry. Co., supra; Wooters v. International & G. N. Ry. Co., 54 Texas, 294; Faires v. Cockerell, 29 S. W. Rep., 672; Gulf, C. & S. F. Ry. Co. v. Richards, 11 Texas Civ. App., 102; Kramer v. Wolf Cigars Co., 15 Texas Ct. Rep., 305; Curtis v. Howell, 39 N. Y., 211; Burch v. Augusta, etc., Ry. Co., 80 Ga., 296; Dickson v. Hartman Mfg. Co. (Pa.), 36 Atl. Rep., 246.

KEY, ASSOCIATE JUSTICE.—Appellee brought this suit against appellants upon a written contract by the terms of which the latter promised to pay $250.50, upon condition that a certain railroad should be built to the city of Cleburne within a specified time, and locate its depot "east of the public square in Cleburne, not more than three blocks east of the Santa Fe passenger depot, and within two blocks south or three blocks north of Henderson street." Appellants admitted signing the contract, and sought to avoid liability upon the ground of fraud, alleging that they signed the contract relying upon certain representations to the effect that the depot would be located on a particular lot within the territory prescribed in the contract.

After hearing the testimony offered in support of the defense referred to, the trial court instructed a verdict for the plaintiff, and its action in so doing is assigned as error. The trial court was correct. There was no proof tending to show that any mistake was made in writing the contract, or that appellants were deceived as to its terms. Such being the case, it is not permissible to vary the terms of the written contract by showing an agreement to locate the depot on a particular lot, when by the terms of the written instrument it was permissible to locate it elsewhere. (Wooters v. International & G. N. Ry. Co., 54 Texas, 294; Faires v. Cockerell, 29 S. W. Rep., 672 and 88 Texas, 428.) The two cases just cited are quite similar to the one in hand. It is true that in Faires v. Cockerell the Supreme Court reversed the Court of Civil Appeals, but not on the question now under consideration. Upon that point the Supreme Court sustained the decision of the Court of Civil Appeals.

No error has been shown and the judgment is affirmed.

Affirmed.

ADRIAN YOUNG v. OCTAVIA TRAHAN ET AL.

Decided October 17, 1906.

1.—Trespass to Try Title—Common Source.

When adjoining owners have purchased land from a common vendor, and there is a dispute between them about their boundary line, each claiming that his tract extends over on that claimed by the other, such vendor is the common source of title as to that part of the land in controversy.

2.—Same—Proof of Common Source—Effect.

Where, in trespass to try title, the plaintiff introduces evidence for the purpose only of showing common source of title, such evidence will not be considered as showing title in the defendant unless introduced by him.

3.—Limitation—Deed—Description of Land.

The object of the statute, in making the registry of the deed necessary to the bar of five years limitation is to give notice to the owner that the person in possession is claiming under the deed, and if there is such uncertainty of description that it will not answer the purpose intended, it can not be considered a deed duly registered under the statute. The deed, as it is found on the record, should of itself furnish notice of the particular land claimed, without resorting to extrinsic evidence.

4.—Same.

A deed which described the land conveyed as follows: "Said 14 acres of

land is to be 2 acres in front and runs back north 7 acres and known as the Edwards place," is too defective in description to support the five years statute of limitation.

5.—Limitation—Ten Years.

Facts considered, and held not sufficient to support ten years limitation.

Appeal from the District Court of Liberty County. Tried below before Hon. L. B. Hightower.

Marshall & Marshall, for appellant.—The plaintiffs below having failed to establish a title to the land described in their petition from the sovereignty of the soil, and having shown that the common source if any gave the superior title by eleven years to defendant, the plaintiffs were not entitled to recover. Briscoe v. Bronaugh, 1 Texas, 329; Burns v. Goff, 79 Texas, 239; Howard v. Masterson, 77 Texas, 42; Parsons v. Hart, 19 Texas Civ. App., 304; Curdy v. Stafford, 88 Texas, 124.

The object of the statute of five years limitation in making the registry of the deed necessary to enable the possessor to avail himself of the five years statutes is to give notice to the owner that the defendant in possession is claiming under the deed. And in this case the land held by defendant was known for a period of thirty-five years as the Edwards or Beaurdreaux place and plaintiffs were bound to take notice, knowing the limits of the Edwards or Beaurdreaux place, whether or not said place took in any of the land claimed by them, and that said defendant claimed same under the deed calling for the Edwards or Beaurdreaux place. Flanagan v. Boggess, 46 Texas, 335; Kilpatrick v. Sisneros, 23 Texas, 136; Wofford v. McKinna, 23 Texas, 36; Day v. Needham, 2 Texas Civ. App., 680; McDonough v. Jefferson Co., 79 Texas, 537.

Stevens & Pickett, for appellees.—Where adjoining owners have purchased their separate tracts of land from a common vendor and there is a dispute between them about the boundary line of their tracts, each claiming that his tract extends further over on to the other's than the other admits, such common vendor is the common source of title of the said two parties to the portion of land in controversy between them; and when one of them brings suit for such portion of the land in controversy and shows such purchase from their common vendor he has established a common source of title. Rice v. St. Louis, A. & T. Ry. Co., 87 Texas, 93; Webster v. McCarty, 40 S. W. Rep., 823.

If the land in controversy is not embraced within the bounds or description of the deed under which defendant set up five years limitation, title by limitation can not mature, under said five years statute. Carley v. Parton, 75 Texas, 102; Evans v. Foster, 79 Texas, 51.

Where defendant sets up five years limitation the deeds under which he claims must describe the land with certainty sufficient to give the world notice of where the boundary lines to the land he claims are located. Kilpatrick v. Sisneros, 23 Texas, 136; Wofford v. McKinna, 23 Texas, 45; Cook v. Oliver, 83 Texas, 559; Flanagan v. Boggess, 46 Texas, 335.

In a conflict of boundary between two adjoining owners of land, if

one of them has improvements lapping over the line of the other only a short distance, that is not sufficient to give notice of an adverse holding and limitation would only apply to the land actually occupied and enclosed, and just how much land over the line is so occupied must be shown by the party setting up limitation, and he must also show that it has been occupied sufficient time to mature title under the ten years statute of limitation. Tucker v. Smith, 68 Texas, 482; Blassingame v. Davis, 68 Texas, 597; Bracken v. Jones, 63 Texas, 184; Carley v. Parton, 75 Texas, 102; Evans v. Foster, 79 Texas, 51.

NEILL, ASSOCIATE JUSTICE.—This suit was brought by appellees on August the 16th, 1904, against the appellant to recover a certain tract of one hundred and forty acres out of the Dever league in Liberty County. Besides the ordinary allegations in an action of trespass to try title, appellees' petition also avers title under the five and ten years' statutes of limitation. The appellant entered a disclaimer as to all the land sued for, except a certain tract of fourteen acres described in our conclusions of fact; as to which he pleaded not guilty, and the five and ten years statute of limitations. The case was tried without a jury and the trial resulted in a judgment in favor of appellees for a strip of the land claimed by appellant to be a part of the fourteen acre tract claimed by him; which strip, the court found was not part of said tract, but a part of the tract of one hundred and forty acres sued for.

Conclusions of Fact.—The land sued for is a part of a tract of 553 3-10 acres of the Dever league at one time owned by David Fruger, he having purchased it from John Piere Fruger, Cevile Dugat and Mary Dugat, his wife, in 1879. On June 10, 1892, David Fruger conveyed to Celestine Smith and others 201 acres off the west side of said tract of 553 3-10 acres which is described in the deed of conveyance by metes and bounds. Appellees proved a regular chain of title to 140 acres of this tract of 201 acres from the grantees in said conveyance down to themselves. They then introduced in evidence, for the purpose only of showing a common source of title, a deed from David Fruger to F. Bourdreaux, dated July 11, 1881, which purports to convey fourteen acres of the Dever's league situated in Liberty County, described as follows: "Said 14 acres of land is to be 2 acres in front and runs back north 7 acres and known as the Edwards place," and mesne conveyances extending from Bourdreaux down to the appellant. The deed to him being dated January 31, 1894, and describes the tract of fourteen acres, as do all the other deeds in the chain from Bourdreaux down to him, just as it is described in the deed from David Fruger to Bourdreaux. The 14 acres claimed by appellant under this chain of title is a part of the land sued for by the appellees and claimed by them under a regular chain of title from David Fruger down to themselves. And the evidence is sufficient to show that the strip of land adjudged by the court to appellees, though claimed by appellant to be a part of the 14 acres described in the deeds to him, is a part of the land embraced in the deeds to appellees, and no part of that described in the deeds to appellant, and that without such strip he has all the land his deeds call for, and the very land his deeds describe. The evi-

dence shows that the deed under which the appellant claims was recorded and that he had paid all the taxes due on the land described by it from its date down to the time this suit was brought. As is seen from our statement of the case, this suit was instituted on August the 16th, 1904. It was tried in September, 1905. The appellant testified that he went on the land just eleven years before the trial, which would make the date of his entry upon it, July, 1894; that he built his house in August of the year he went there, and he did not build his fence until a month or so after he built his house. From this testimony, as well as from other evidence in the record, we conclude that appellant failed to show such facts as were necessary to make out his defense of the ten years' statute of limitation, in that he failed to show ten years occupancy accompanied with cultivation, use or enjoyment.

Conclusions of Law.—It is contended by appellant that the court erred in its judgment because appellees neither proved title from the sovereignty of the soil nor from a common source. Clearly they did not prove a regular chain of title from the State; but this was not required, if they showed a superior title to appellant's under a common source. The question, then, is did they prove such title? It is contended by appellant that they did not, for the reasons that the evidence does not show that David Fruger is the common source of title to the strip of ground adjudged to appellees, in that the titles emanating from him are two separate and distinct tracts of land. This contention can not be sustained, for the facts bring the case within the principle that "where there is a question as to the position of a common line, there is necessarily a contest concerning the land embraced between the respective positions of the line as claimed, and where the defendant seeks to hold it as within the boundaries of his deed, it is such a chain as enables plaintiff to deraign his title from the source from which defendants' title has come," announced in Huth v. Heermann, 5 Texas, Civ. App., 655. Indeed, the principle that "where adjoining owners have purchased land from a common vendor and there is a dispute between them about their boundary line, each claiming that his tract extends over on that claimed by the other, such vendor is the common source of title as to that part of the land in controversy," formulated as a proposition in appellees' brief, is not only logically correct, but sustained by authorities. (Rice v. St. Louis, etc., Ry. Co., 87 Texas, 92.)

It is also urged under this assignment, that if a common source of title be shown the very evidence which proves it establishes appellant's title as the superior one because it was the first to emanate from that source. This would be correct had the appellant proved the execution of the deed under which he claims from Fruger to Bourdreaux. But he failed to do so, and, on this account, the deed was excluded when offered by him in evidence. He contends, however, that inasmuch as it was introduced in evidence by the appellees to prove common source of title, it was in evidence for every purpose. This position is not correct; for in making proof of common source of title the plaintiff has the right to introduce his evidence for that purpose only, and where so introduced it will not be considered for the purpose of showing title in defendant, unless introduced by him. (Ogden v. Bosse,

86 Texas, 346.) In this case it is said: "The proof of common source does not mean that defendant has title under the claim proved, but that he claims to have title under it. . . . It is true when both parties claim title under a common source, the plaintiff must prove that he has the better title in order to recover; that is, the title produced by the plaintiff must be better than that produced by the defendant; but this rule does not require of the plaintiff to prove defendant's title in order to show his own is superior." Hence, Fruger being the common source under whom both parties claimed, and appellees having shown a regular chain of title from such source, and the appellant having adduced no evidence of title therefrom, appellees were entitled to recover the land in controversy unless defeated by the statute of limitations.

The object of the statute, in making registry of the deed necessary to enable the possessor to avail himself of the five years limitations, is to give notice to the owner that the defendant in possession is claiming under the deed; and if there is such uncertainty of description that it will not answer the purpose intended, it can not be considered a deed duly registered under the statute. (Kilpatrick v. Sisneros, 23 Texas, 136; Flanagan v. Boggess, 46 Texas, 335; Cook v. Oliver, 83 Texas, 559; Mooring v. Campbell, 47 Texas, 39; Longley v. Warren, 11 Texas Civ. App., 269.) As is said in the case last cited, "the claim under the five years' statute was not intended to rest on any such footing or movable basis, but should be fixed and certain, serving notice of the boundaries of the hostile claim and possession." It needs no argument to demonstrate that the land described in appellant's deeds can not be identified by the description given it in such deeds without resorting to extrinsic evidence. The deed as it is found on the record should itself furnish such notice to the owner of the land as will enable him to identify it without making other inquiry, so that he may protect his rights against one in possession claiming under it. The description in the deeds under consideration give no such notice, and therefore do not support the five years statute of limitation.

The appellant having failed to prove adverse possession, accompanied by cultivation, use or enjoyment, of the land for the full period of ten years next before the institution of this suit, did not make good his plea of limitation under the statute of ten years. (Article 3343, Revised Statutes of 1895.)

These conclusions of law together with our findings of fact, dispose of all appellant's assignments adversely to him and require an affirmance of the judgment.

Affirmed.

Writ of error refused.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS v. JAS. M. POPE.

Decided October 17, 1906.

1.—Manner of Stopping Train—Question of Fact—Negligence.

Plaintiff alleged that, while in the performance of his duties as a brakeman upon one of defendant's freight trains, the train was stopped by the engineer in such a sudden and unusual manner as to cause him to be thrown to the ground and injured. Evidence considered, and held not only sufficient to require the submission to the jury of the issue of negligence in the respect alleged, but also sufficient to support the verdict of the jury finding the defendant guilty of negligence.

2.—Servant—Safe Place to Work—Duty of Master.

It is the duty of a master to exercise ordinary care in providing a reasonably safe place for the servant to work. This duty is nondelegable, and the servant has the right to assume that it has been performed. Facts considered, and held to support the finding of the jury that the defendant company was guilty of negligence in leaving a string of cars uncoupled on a siding, plaintiff's duty requiring him to walk along the top of said cars.

3.—Master's Negligence—No Assumed Risk.

A servant never assumes the risk of a danger arising from his master's negligence unless he knows of the act of negligence, or, in the discharge of his duties, it was so open to observation that he will be charged with notice, and is cognizant of the danger incident thereto.

4.—Same—Contributory Negligence.

A servant has the right to assume that the master has performed his duty, and to act upon such assumption, and is not guilty of contributory negligence in so doing.

5.—Written Rule—Not Necessary for Court to Construe, When.

When a rule of the defendant company for the guidance of its employes is in writing, and is free from ambiguity and not open to construction, and when the applicability or inapplicability of said rule to the siding in question was a question of fact to be determined by the jury, it was not necessary for the trial court to construe such rule in its charge to the jury.

6.—Known Negligence of Master—Duty of Servant.

The court charged the jury as follows: "If cars were usually or customarily left coupled together, but if they were sometimes or occasionally left uncoupled, then if that fact was known to plaintiff, or if it was obvious to plaintiff while engaged in his work as brakeman, then it became his duty to use ordinary care to ascertain if the cars were uncoupled on the occasion in question, and if he failed to use ordinary care to ascertain whether or not the cars were coupled, then, if he was injured as the proximate result of the cars being uncoupled, he can not recover." Held, when taken in connection with entire charge, not susceptible of the construction that, if the cars were usually or customarily left coupled together, then, as matter of law, no duty rested upon plaintiff to ascertain whether the cars were coupled on the occasion of the injury. But, query, even if so construed, would it not be proper?

7.—Same.

In order to relieve the master from liability for failure to perform a duty the knowledge of the servant must be of the failure to perform the particular duty in question, and not only of his failure to discharge a similar duty on prior occasions.

8.—Concurring Negligence of Master and Servant—Liability to Third Party.

A railroad company is not relieved from liability for a negligent act of its

engineer in operating a train because such engineer knew, or might have known by the exercise of ordinary care, that the company itself has been guilty of another act of negligence which concurred with his own in causing an injury to another servant.

9.—Usual Manner of Operating Train—Assumed Risk.

The court charged the jury that, if they believed from the evidence that the engineer of the train on the occasion in question stopped the train in the usual and customary manner of stopping trains on defendant's road, under similar circumstances, then the plaintiff assumed the risk from the manner in which the cars were stopped, and was not entitled to recover, even though they believed that, had it not been for the manner in which the cars were stopped, plaintiff would not have been injured. Held, the charge was correct.

Appeal from the District Court of Smith County. Tried below before Hon. R. W. Simpson.

E. B. Perkins and *Marsh & McIlwaine,* for appellant.—"Although there may be sufficient evidence in a case to require the court to submit it to the jury yet if the verdict rendered thereon is against the preponderance of the evidence to that degree which shows that manifest injustice has been done, the trial court may and should grant a new trial" and upon its failure to do so the judgment should be reversed and the cause remanded by this court. Choate v. San Antonio & A. P. Ry., 90 Texas, 88; s. c. 91 Texas, 409, 410; Lee v. International & G. N. Ry., 89 Texas, 590; Gulf, C. & S. F. Ry. v. Wilson, 59 S. W., Rep., 591.

The master is required to use only ordinary care and diligence to avoid injuring his servant. The presumption is always that this duty has been performed by the master, and, in a suit by a servant to recover damages for injuries received by him while doing the work of the master, the burden of proof is upon him to show not only how the injury was inflicted, but he must also show by a preponderance of the evidence that the injuries were the direct and approximate result of the master's negligence. This being true, the mere fact that the cars separated would not show that the separation was the result of negligence on appellant's part, the occurrence not being one of that nature to which the rule "Res Ipsa Loquitur" is applicable. Houston & T. C. Ry. v. Barrager, 14 S. W. Rep., 242; Missouri, K. & T. Ry. v. Thompson, 11 Texas Civ. App., 658; Patton v. Texas & Pac. Ry., 179 U. S., 658; Northern Pac. Ry. v. Dixon, 139 Fed. Rep., 737.

The mere fact that the locomotive and cars were suddenly stopped would not render appellant liable to appellee. The burden of proof being upon appellee, it was necessary that he show by a preponderance of the evidence that the sudden stop was the result of the negligent omission of some legal duty due him by appellant which directly and proximately caused him to be injured. Lovett v. Gulf, C. & S. F. Ry., 79 S. W. Rep., 514; Texas & Pac. Ry. v. Bigham, 90 Texas, 223; Neely v. Ft. Worth & R. G. Ry., 72 S. W. Rep., 159.

Where the evidence tending to support an issue is only sufficient to raise a mere surmise or suspicion the question is one of law and not of fact. Joske v. Irvine, 91 Texas, 574; Texas Loan Agency v. Fleming, 92 Texas, 463.

The rule introduced in evidence being in writing, it was the province of the court to interpret it, and it clearly appearing that the rule was intended only to prevent cars left standing on sidings from running upon the main line and thereby endangering the lives of those operating trains thereon, the fact that appellant may have been guilty of negligence in failing to keep the cars coupled would not render it liable in that its negligence in this respect would have been merely a condition which rendered the injury possible and not the direct and proximate cause of the injury. And for this reason it was error for the court to submit as a distinct ground of recovery the negligence of appellant in failing to keep the cars coupled. Texas & Pac. Ry. v. Bigham, 90 Texas, 223; Neely v. Ft. Worth & R. G. Ry., 72 S. W. Rep., 159; Ft. Worth & R. G. Ry. v. Neely, 60 S. W. Rep., 282.

"In order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." And the court, by instructing the jury that appellant would be liable if an ordinarily prudent person could have reasonable anticipated, etc., put the duty too strong on appellant, and for this reason the charge was erroneous. Milwaukee & St. P. Ry. v. Kellogg, 94 U. S., 469.

The court erred in refusing to charge the jury as requested by defendant in its special charge No. 7 as follows:

"You are charged, at the request of the defendant, that although you may believe from the evidence in this case that the engineer did not use the proper care and caution in stopping the locomotive, yet if you believe from the evidence that plaintiff would not have been thrown by reason of the manner in which the locomotive was stopped; had it not been that the cars were uncoupled, then the fact that the engineer did not use the proper care and caution in stopping the locomotive would not render the defendant liable unless you believe from the evidence that the engineer ought reasonably, by the exercise of ordinary care and caution on his part, have foreseen or known that the cars were not coupled together." Texas & Pac. Ry. v. Bigham, 90 Texas, 223; Neely v. Ft. Worth & R. G. Ry., 72 S. W. Rep., 159; Ft. Worth & R. G. Ry. v. Neely, 60 S. W. Rep., 282.

Johnson & Edwards, for appellee.—It was the exclusive province of the jury to judge of the weight and credibility of the testimony; and the first five assignments will be overruled if there was evidence from which the jury might reasonably have found either that appellant was negligent in the manner of handling or stopping the train or was negligent in leaving the cars uncoupled while standing together in a string on the side track, apparently coupled, or was negligent in so adjusting the coupling lever that the cars could not be coupled automatically, and that appellee did not assume the risks of the cars being uncoupled under such circumstances and of the lever being so adjusted, and was not guilty of contributory negligence. Gulf, C. & S. F. Ry. Co. v. Holland, 66 S. W. Rep., 69, 70; Houston & T. C. Ry. Co. v. Rowell, 45 S.

W. Rep., 766, 767; Texas & N. O. Ry. Co. v. Lee, 74 S. W. Rep., 349, 350.

Appellee assumed only the risks which were ordinarily incident to the service in which he was engaged and those which he knew or were obvious to him. Appellant's rule and ordinary care for the safety of appellee and others in similar service required that the cars in question be coupled together, and the cars were usually and customarily coupled together under circumstances similar to those in evidence; the evidence showed only occasional or isolated acts of negligence upon the part of appellant's employes in leaving the cars uncoupled on the sidings in question, and appellee did not assume the risk of the cars being uncoupled. The issues of fact involved in the question of the assumed risk were properly submitted to the jury, and the evidence fully warrants the verdict. St. Louis S. W. Ry. Co. v. Pope, 98 Texas, 535, 540; Bonnett v. Galveston, H. & S. A. Ry. Co., 89 Texas, 72; Missouri, K. & T. Ry. Co. v. Hannig, 91 Texas, 347, 351; Texas & Pac. Ry. Co. v. Eberhart, 91 Texas, 321; Fordyce v. Culver, 22 S. W. Rep., 239, 240; Missouri, K. & T. Ry. Co. v. Milam, 50 S. W. Rep., 421, 422; International & G. N. Ry. Co. v. Johnson, 55 S. W. Rep., 772; Louisville & N. Ry. v. Vestal, 49 S. W. Rep., 204.

Appellee was in the proper and diligent discharge of his duty; the cars were standing in a string, apparently all coupled together; his train backed against and coupled to them without stopping and continued to back along the side track, when it became his duty to, and he did at once get on top of the cars and walk over them to the rear car; it was dark; under these circumstances it was neither required nor customary nor practicable for appellee to make the inspection necessary to ascertain that the cars were not in fact coupled. The issue of contributory negligence was properly submitted to the jury, and the evidence fully warrants their finding upon that issue. St. Louis S. W. Ry. Co. v. Pope, 98 Texas, 535, 540; International & G. N. Ry. Co. v. Sipole, 29 S. W. Rep., 686.

NEILL, ASSOCIATE JUSTICE.—This is the second appeal in this case by the railway company. The nature of the case is so fully and clearly stated in the opinions on the first appeal (82 S. W. Rep., 360, 98 Texas, 535, 86 S. W. Rep., 5) it is deemed unnecessary to reiterate it. The judgment now before us is for $20,000.

The first five assignments complain of the court's overruling appellant's motion for a new trial. These assignments, for the purpose of obviating a separate statement under each, are grouped and presented together in appellant's brief. As they present different propositions, we are asked not to consider them because violative of rules prescribed for briefing causes. But as they all attack the sufficiency of the evidence to support the verdict, and much of the testimony is as pertinent to one assignment as to the other, and, in order to deduce conclusions of fact, we must review the evidence any way, it will be much more convenient for us in arriving at our conclusions of fact to consider the assignments in connection with the propositions and counter-propositions and statements under them contained in the briefs of either party than it would be should we ignore them.

The disposition of these five assignments will constitute our conclusions of fact, which will be made in observance of the well-established principle that the most favorable inference which the entire evidence will authorize should be drawn in favor of the verdict.

1. Under the first assignment it is contended that the verdict is contrary to the law and the preponderance of the evidence, in that there is no evidence showing defendant's employees in charge of its locomotive operated the same other than would have been done by an ordinary prudent person under similar circumstances; that there is no evidence showing that the engineer was guilty of negligence in stopping the train, but that it shows conclusively he stopped the engine and cars in a careful and prudent manner. This assignment is followed by the proposition, that "although there may be sufficient evidence in a case to require the court to submit it to the jury, yet if the verdict rendered thereon is against the preponderance of the evidence to that degree which shows that manifest injustice has been done, the trial court may and should grant a new trial; and on its failure to do so the judgment should be reversed and the cause remanded by this court."

If the only ground of negligence alleged as plaintiff's cause of action were that of defendant's employes in handling the engine or of the engineer in stopping the train, and there were no evidence reasonably tending to prove such act of negligence, unquestionably the motion for a new trial should have been granted for that reason. But it is seen from the pleadings that other grounds of negligence were alleged and from the record that evidence was introduced to sustain them. Therefore, if it should be conceded that there was no evidence tending to show negligence in operating the engine or in stopping the train, it would not follow that a new trial should have been granted on that ground, unless it should further appear that the evidence upon the other grounds of negligence was insufficient to prove them, or, if proven, that appellee's injuries were not proximately caused by them. But can it be said there is no evidence tending to prove the act of negligence referred to in this assignment? The very proposition asserted under it impliedly admits there is; but seeks to avoid it upon the ground that the finding of the jury is against the preponderance of the evidence to an extent that shows manifest injustice has been done. It is the province of the jury to determine the credibility of witnesses and the weight to be given their testimony. While this province may not be invaded by judges, the trial judge, who hears the testimony and observes the demeanor of the witnesses, the deportment of the jury during the trial and the attention given by its members to the testimony and argument of counsel, may determine whether the jury has gone beyond the bounds of its province to render a verdict against the preponderance of the evidence which manifests injustice; but, having determined this question on a motion for a new trial in favor of the verdict, an Appellate Court will not, ordinarily, if the evidence were sufficient to carry the case to the jury upon an essential issue, disturb the verdict. Therefore, the question for us to determine under this assignment is, whether there was any evidence tending to sustain plaintiff's allegation that defendant's engineer was guilty of negligence in stopping the train from which the plaintiff fell? The engineer, know-

ing or charged with knowledge of the fact that the plaintiff in the discharge of the duties of his employment was on top of the cars composing the train, was charged with the duty of ordinary care for plaintiff's safety, that is, such care as would have been exercised by a man of ordinary prudence under the same or similar circumstances. If, in his manner of stopping the train, he failed to discharge this duty to the plaintiff, he was guilty of an act of negligence imputable to the defendant. In determining whether an act is negligent, the relation of the party charged with the act to the one complaining of it; their duties growing out of such relation; their relative situation or position, at the time the act was done, and all the attending facts and circumstances tending to throw light upon or indicate its character, should be taken into consideration.

At the time the act in question was committed, one of defendant's freight trains, of about 28 cars with a crew consisting of a conductor, engineer, and three brakemen (plaintiff being the rear brakeman) reached Mt. Pleasants and backed onto a storage track against a string of cars standing thereon, apparently coupled together, pushing them toward the opposite end of the siding. When the train took the siding, plaintiff in pursuance of his duty, coupled the rear car of the train to the front car of the string, climbed on the standing cars and commenced to walk on top of them to the rear car, for the purpose of setting the brakes and signalling the engineer when they were pushed far enough. When he reached the open space between the third and second car from the end of the train farthest from the engine and was in the act of stepping from the end of one car to the other the engineer, without warning, when the train was running from four to six miles an hour, stopped the train which caused the second car from the rear, upon which plaintiff was about to step from the third, to separate from the train and to roll, with the rear car attached thereto, a distance of 25 feet from where the car stopped from which it parted, thereby causing the plaintiff to lose his footing and fall from the end of the car between the rails of the railroad track, whereby he was seriously and permanently injured.

J. B. Taylor, one of the brakemen, who was on top of the train, about seven or eight cars from the engine, testified that at the time plaintiff was hurt the train stopped suddenly; that the engine and some of the cars in the train were equipped with air, the air working and that the engineer applied the air and the train stopped; that he knew the difference between a service application and an emergency application of air brakes, and that the train stopped like an emergency application of the brakes was made.

The plaintiff testified: "I was walking towards the rear so as to get to the last car, and I lacked two cars of being on the last one, and I was about to step onto another one, when the train stopped and the car I was stepping to went out from under me and I went to the ground. According to my best judgment we were going about five or six miles an hour at the time. It seemed to me to be an emergency stop. The train stopped by means of the air brakes. The emergency application is made with about all the air available, and stops the train almost instantly. A stop can be made gradually by giving just a little air at a

time; that is a service application. When the air is applied at once and a stop is made as quick as it can be made, that is called the emergency application of the air. From my experience as a railroad man and the character of the stop that was made I would consider that it was an emergency application of the air that stopped the train that night. It stopped as quick as you could snap your finger. The train stopped, but the other two cars rolled away, and that caused me to fall to the ground right in front of the car I stepped from. I struck the ground right in front of it, in the middle of the track. I guess I struck the ground some six or seven feet in front of it. I did not reach that point, because it was stopped and could not reach it. It stopped at once. The service application of the air is the usual, customary and proper application of the air in switching trains and cars in the yards and under circumstances as in this case. It is not common for a train switching in the yards under circumstances as in this case to be stopped suddenly as the engineer did this train. They slow them down. That is the usual and customary stop. The train was not handled that night in the manner that is customary and usual under the circumstances with reference to a stop. There was no emergency that I knew of requiring an emergency application of air. . . . I had not given any signal to stop the train. There was nothing to require the engineer to stop the train as suddenly as it was stopped. The sudden stopping of the car threw me off, together with the rolling away of the other car to which I had started to step." The nearest car on the track north of where plaintiff was found lying after he fell was about eight feet from him and the nearest south was about eighteen feet. The car nearest him was the one from which he fell and the one south the one he was about to step upon when the train parted.

This evidence in our opinion was reasonably sufficient to warrant the jury in finding that the engineer brought the train to a sudden stop and that it proximately contributed to the plaintiff's fall and consequent injury. This being so, can it be said that the jury were not warranted in finding that this act was negligence? When it is considered that the engineer knew that plaintiff was on top of the train and that his duty required him to walk to the rear end, stepping from one car to another; that in making stops on such occasions prior to that time, generally the train was slowed down and gradually brought to a standstill without a jar of any moment; that by the laws of dynamics to bring a train moving at its speed to a sudden stop would tend to project an unfastened object on top in the direction the train was going with a force in direct ratio to the speed of the train, it can not be said as a matter of law that such act was not negligence. On the contrary, it must be considered a matter of fact for the determination of the jury, and the jury having decided in view of all the attending facts and circumstances that it was negligence, and the trial judge having sanctioned the verdict, it is not for this court to disturb it; but its duty to make such finding of facts its own, which is accordingly done.

2. The second assignment of error complains of the failure of the court to grant defendant a new trial upon the ground that the verdict is against the great weight and preponderance of the evidence, in that it conclusively shows that the rule of the defendant company requiring

that cars left on sidings at grade should be coupled together, etc., was not applicable at Mt. Pleasants, and that the grade of the side track there was not such as rendered it necessary to couple them together, because the evidence shows they would be held in place by their own brakes, and plaintiff had no right to presume that they would be coupled. The rule referred to in this assignment is as follows: "Conductors must see that the brakes are set on cars they leave on sidings, and when the siding is on grade, they must, when practicable, couple all cars together; and in addition to setting the brakes the wheels must be blocked and safety switches properly adjusted. When not in use safety switches must be left open. In switching trainmen must know that brakes are in good order before cutting off cars." It is unnecessary to iterate the evidence pertinent to this assignment; but it is deemed sufficient to say that, while it is conflicting, it is amply sufficient to warrant the jury in finding that the siding on which the cars were standing was on grade, and such as under the rule required that cars left standing thereon be coupled together; that it was so construed and acted upon by defendant's employes in storing cars on said siding; and that, as it appeared to plaintiff the cars were coupled together, he had the right to assume the rule had been observed and that the cars were coupled together. And that, when it is considered that it was plaintiff's duty to couple the string of cars to the rear of his train, then go on top and walk thereon to the rear end of the farthest car of the string so coupled, the jury were warranted in finding as a fact that the failure of defendant to couple all the cars left standing on the siding, as required by said rule was such a breach of duty it owed to plaintiff as constituted negligence. For after the train was coupled to the cars on the siding, from the nature of his employment, the top of the cars became plaintiff's place to work, which the law required the defendant to use ordinary care to see was reasonably safe for him in the discharge of such duties. This duty rests upon the master and is nondelegable; and the servant had the right to assume that it had been performed. It can not be said as a matter of law that a railway company who leaves a string of cars on a siding where its rules require them to be coupled together, which, though apparently coupled, are uncoupled, which it requires afterwards to be coupled to a train and pushed back along the siding, could not reasonably anticipate that the train would part where the cars were not coupled, and a servant whose employment required him to walk along the top of the cars would probably, by reason thereof, fall or be thrown therefrom to the ground and injured. On the contrary, it seems to us, that nothing could in the nature of things, be more reasonably anticipated from such facts. Wherefore, we overrule the assignment and find, in accordance with the verdict, that the defendant was guilty of negligence in leaving the string of cars uncoupled on the siding and that such negligence caused, or at least concurred with other acts of negligence alleged against defendant in causing plaintiff's fall and consequent injuries.

3. It is contended by the third assignment of error that the verdict is without evidence to support it, in that the evidence shows that plaintiff had no right to assume that the cars would be coupled together at the time he attempted to pass over the top of the same, and that he,

in attempting to pass over the tops of the same in the manner he did, assumed the risk of the cars not being coupled together. We have anticipated one of the questions raised by this assignment in disposing of the preceding one by holding that plaintiff had the right to assume that defendant, under the facts and circumstances, had discharged the duty, personal to it, of having the cars coupled together. From which it follows as a logical sequence that, in passing along the tops of them, he did not assume the risk of their being uncoupled; for a servant never assumes the risk of a danger arising from his master's negligence, unless he knows of the act of negligence, or in the discharge of the duties of his employment it was so open to his observation that he must necessarily have known of it, and is cognizant of the danger incident to such act of negligence. The evidence shows no knowledge of plaintiff of the fact that defendant had failed to discharge its duty of having the cars coupled together, nor of such facts as would, in the course of his employment, impute to him knowledge of such act of negligence. Besides, the evidence is sufficient to show that, even had it been proven that plaintiff knew or was charged with knowledge of such negligent act, had it not been for the negligence of defendant's engineer in suddenly stopping the train, that the cars, though uncoupled, would probably not have separated. Hence the plaintiff, not anticipating such negligence of the engineer, could not, though he had known the cars were uncoupled, have foreseen the danger arising therefrom in connection with such act of negligence of the engineer; and would not, therefore, be held to have assumed the risk of walking along the tops of the cars. Hence, we find, with the jury, as a fact that no such risk as is indicated by the assignment of error was assumed by the plaintiff.

4. The fourth assignment of this group complains of the court's not granting defendant a new trial upon the ground that the preponderance of the evidence shows that plaintiff knew, or should have known, by the exercise of ordinary care and diligence, that the cars were not coupled together before and at the time he attempted to pass over them, and had it not been for his own negligence in attempting to pass over the cars without ascertaining they were uncoupled he would not have been injured. This assignment is like the one just disposed of, save that it substitutes contributory negligence for assumed risk, and the questions raised by it have virtually been settled by our disposition of the others. Instead, however, of the preponderance of evidence showing that plaintiff knew the cars were uncoupled, it indisputably shows that he was wholly ignorant of such fact. His testimony, cited by us in considering the first assignment of error, shows that the cars appeared to him to be all coupled together and that he thought they were. As has been seen, it was defendant's duty to have them coupled, that plaintiff had the right to assume such duty had been performed and act upon such assumption and that he did act upon it. An act of negligence of the master towards his servant can not be so shifted from the one to the other as to make the latter guilty of contributory negligence in doing another act in the discharge of his duty, unless he knew or was charged with the former's negligent act and realized the danger incident thereto. Hence, we find as a fact that plaintiff was not guilty of contributory negligence either in failing to inspect the cars for the

purpose of ascertaining whether they were coupled, or in assuming they were coupled and proceeding on such assumption to the discharge of his duty.

5. The fifth and last assignment of this group of assignments, complains that the verdict is against the great weight of evidence in that there is no evidence that defendant was guilty of any negligence in respect to the separation of the cars, it appearing from the evidence (1) that the coupling appliances of the cars were in good condition; (2) that though in such condition, there was no evidence that the cars were put on the siding at the same time or in the same string; (3) there was no evidence tending to show when the cars were put on the siding, nor that defendant, by the exercise of ordinary care could have discovered that the cars were not coupled together before plaintiff was injured; and (4) there was no evidence that the lever of the coupler of the cars was raised when the cars separated. As we read the record, there was evidence on all these issues, such as warranted the jury in finding in plaintiff's favor upon them.

The string of cars referred to in the assignment consisted of seven or eight freight cars all equipped with automatic couplers. The witness Cella testified that he and Turney examined the coupler of the car that separated from the train about twenty-five minutes after the accident happened and that, in working the coupler by raising the lug, then shoving the knuckles in and dropping the lug, he noticed that the knuckles would open two or three times and would not hold. Turney testified that the coupler was what is called the "Missouri Pacific Coupler," which is worked by a bar or lever that raises the lug which holds the knuckles in their place; that the knuckle is in the end of the drawbar; that when the lever is pushed up it raises the lug and there is a notch or socket that the lever can be pushed into and it will lock and hold the lug up, and the coupling can not be made as long as the lug is up; and this is the condition in which he found the coupler. That when the lug is dropped it holds the knuckles in their place and the coupling is made; that the lug of the coupler, so far as he knew, was in good order; but that the lever was up and placed in a notch to hold it up; and that he called Cella's attention to the position of the lug and lever of the coupler, and remarked to him, "This is how Jim was hurt." The witness Hickman testified that he examined the couplers of both cars (the one that separated from the train and the one in the train next to it) about twenty-five minutes after plaintiff was injured. That both couplers were automatic and operated by a lever; that the lever on the car north of Pope was down and the knuckle closed, and the lever of the one south of him was raised and locked so that it would not couple automatically, and that the condition of the coupler on the car south of Pope was such that it would not couple automatically or by coming in contact with the coupling on another car. This evidence is certainly sufficient to warrant the jury in finding that the coupling appliances of the cars were not in good condition and that the lever of one of the cars was raised when the cars separated. For there being no evidence that the couplers were tampered with between the occurrence of the accident and the time they were examined

by those witnesses, the jury was warranted in concluding that the couplers were in the same condition when the accident occurred that they were when examined. This is told by the accident itself; for it can be accounted for upon no other theory than that the condition of the couplers was the same before the accident that it was found they were afterwards. It is immaterial whether this condition was known to defendant or not. It was its duty to know it, and the simplest inspection would have revealed it, and at the same time disclosed the fact that the two cars were not coupled.

We take it that it is immaterial when the string of cars were placed upon the siding, or whether at the same time or not. However, these were matters peculiarly within the knowledge of the defendant, and if it was material to show that the cars were not placed there together in one "cut" at the same time, it was up to the defendant to prove it; and in the absence of such proof, it should be presumed from the character, condition and relative position of the cars that they were.

6. The sixth assignment of error is directed against the following portion of the court's charge: "If you find from a preponderance of the evidence that some employes of defendant other than plaintiff negligently left a string of cars standing together on the sidetrack in question and apparently coupled to each other and that such employes negligently left some of the cars in the string uncoupled, and that the cars which were so left uncoupled separated while being operated, and if you further find that plaintiff, while in the discharge of his duty as brakeman, was on top of the cars and that while exercising ordinary care he fell from one of the cars to the ground because of the cars separating and was injured as the direct and proximate result of the cars being left uncoupled and would not have been injured if the cars had not been left uncoupled, and if you further find that to leave cars on the sidetrack in question uncoupled when standing together in a string and apparently coupled to each other was negligence and was dangerous and not reasonably safe to plaintiff in the performance of his duty as brakeman in handling and working with the cars or to some other employe of defendant engaged in like service and under the same circumstances, and if you further find that an ordinarily prudent person would have reasonably anticipated or foreseen that plaintiff or some other employe of defendant engaged in the work in which plaintiff was engaged at the time he was injured would likely be injured while working with the cars as plaintiff was when he was injured by the cars being left uncoupled and that an ordinarily prudent person would not have left the cars uncoupled under the circumstances in evidence, then you will find for plaintiff. But unless you do so find as above set forth, you will find for the defendant on this phase of the case; and although you should find as above set forth, still you will find for the defendant if you find that plaintiff assumed the risks of the cars being left uncoupled or was guilty of contributory negligence as explained in other portion of the instructions given you." Under this assignment eight propositions are sought to be maintained, none of which questions the correctness of the abstract principles of law embodied in the charge, but complains that the evidence is insufficient to authorize it. All these propositions, except the seventh, which com-

plains of the court's not interpretating the rule quoted by us in considering previous assignments, which relates to leaving cars on sidings, because in writing, have been answered and disposed of by what we have said in considering the five preceding assignments, and need not be further noticed. In regard to the court's not construing the rule referred to in the seventh proposition under this assignment, we have to say that the rule is free from ambiguity and not open to construction. It is not referred to in the part of the charge complained of. The only question in relation to it was whether it was applicable to the siding upon which the string was placed, which arose from a difference of the witnesses as to the character of the siding, some testifying it was "on grade" within the meaning of the rule, and others that it was not. This was a question of fact and not of construction. The applicability or inapplicability of the rule to the siding in question was only evidence upon the issue of negligence as to the cars being uncoupled, to be considered by the jury in connection with all the other facts and circumstances bearing upon such issue. The applicability or inapplicability of the rule to that particular siding was a question for the jury to decide. They may have considered it inapplicable, and have still found (which they would have been warranted in doing) that in view of all the facts and circumstances bearing upon the issue the defendant was negligent towards the plaintiff in leaving the cars uncoupled upon the siding, or they may have considered it applicable, and have found that taking it in connection with all the evidence defendant was not negligent in leaving the cars there. A jury may find any way they may deem proper and right upon an issue of negligence, if the evidence makes it an issue, and when the verdict has passed the scrutiny of the trial judge, no Appellate Court can rightly disturb it if the charge submitting the issue was correct, unless it can say such finding is so manifestly unjust as to show that it is the product of passion, corruption or prejudice. To the credit of juries, be it said that such cases rarely come before the appellate tribunals of Texas.

7. This part of the charge, "if cars were usually or customarily left coupled together, but if they were sometimes or occasionally left uncoupled, then if that fact was known to plaintiff or if it was obvious to plaintiff while engaged in his work as brakeman, then it becomes his duty to use ordinary care to ascertain if the cars were uncoupled on the occasion in question, and if he failed to use ordinary care to ascertain whether or not the cars were coupled, then, if he was injured as the proximate result of the cars being uncoupled, he can not recover," is made the subject of the seventh assignment of error. It is urged that the effect of this is to instruct the jury that if the cars were usually or customarily left coupled together, that as a matter of law no duty rested upon appellee to ascertain whether the cars were coupled on the occasion he was injured. When this part of the charge is taken and construed with the charge as an entirety it can not be rightly construed to have the effect here contended for. But suppose for the purpose of argument such construction was given it, would it not be in harmony with the law? The duty of inspection primarily rests upon the master, and his servant whom he puts to work may, ordinarily, assume that such duty has been performed; and that his master has used or-

dinary care to provide for his safety by seeing that the place where, and the instrumentalities with which he is to do the work are reasonably safe for him in its performance. It would seem from the character of the work, that there could be no reason for ordinary minds to reach any other conclusion than it would be unsafe to do it unless the string of cars were coupled together; from which it would logically follow that it devolved upon the defendant to exercise ordinary care to see that this was done before placing the plaintiff on the top of the cars where he would likely be injured in the performance of his duties if the cars were not coupled together; and that plaintiff could act upon the assumption that defendant had performed its duty unless he knew the defendant had sometimes failed in this duty to him or its servants in like employment by occasionally leaving such cars uncoupled upon the siding, or it was obvious to plaintiff while engaged in his work as a brakeman. If such was the case, then, according to the part of the charge, it became plaintiff's duty to use ordinary care to ascertain if the cars were uncoupled on the occasion in question (whether plaintiff's knowledge of the fact of defendant's occasionally leaving the cars uncoupled would, as a matter of law, shift the duty of inspection from the master to the servant, we need not determine, though it would seem to us that it is rather a question of fact than of law) and if he failed to use ordinary care to ascertain whether the cars were coupled, and was injured as the proximate result of their being uncoupled, he could not recover. Therefore, if the paragraph of the charge under consideration should be given the forced construction contended for by the defendant, we are not prepared to say that it would be erroneous. But however this may be, the defendant is in no condition to complain of it, for special charges requested by its counsel are as much open to the construction it seeks to have placed on the charge complained of as such charge is itself. We believe the paragraph of the charge in question was more favorable to defendant than it had the right under the law to expect.

8. The eighth assignment of error complains of the following paragraph of the court's charge: "Plaintiff also assumed all those risks which arose from the manner in which defendant conducted the business in which plaintiff was engaged. And, although you may find that a rule of defendant required cars to be left coupled when standing together on the sidetrack in Mt. Pleasant, yet if in the management and conduct of defendant's business they were not usually left coupled, he can not recover if the injuries complained of resulted from such manner, if any, of leaving the cars uncoupled. But if the cars on the sidetrack in question were usually and customarily left coupled to each other when standing together and if the plaintiff did not know and could not have known by the exercise of ordinary care that the cars in question were not all coupled together, then he did not assume the risk of the cars being left uncoupled." Much we have said in considering other assignments is applicable to this one, and need not be repeated. If there is any vice in this part of the charge it is too onerous on the appellee, in that it makes him assume the risk of the cars being uncoupled if by the exercise of ordinary care he could have known that appellant's rule requiring cars on sidings to be kept coupled was not

commonly observed; for a rule of the master which simply declares and provides for a duty personal to him, which he owes to the servant can not, because habitually violated, exonerate the master from the discharge of such duty, and cast upon the servant the burden of discharging it and charge him with the assumption of a risk which never would have occurred had the master discharged his duty. If such were the law, the master would have only to make a rule declarative of a non-delegable duty, and then so habitually violate it as to bring knowledge to his servant, in order to exonerate himself from the consequences of his failure to discharge it, by visiting the consequences of such failure upon the very servant to whom he owed such duty. In no case does the servant assume the risk from the failure of the master to do his duty, unless he knows of the failure and the attendant risk, or, in the ordinary discharge of his own duty, must necessarily have acquired the knowledge. His knowledge must be of the failure of the master to discharge the very duty, the breach of which is complained of, not his failure to discharge a similar duty on prior occasions. It makes no difference if the master has frequently before failed to discharge a similar duty, unless such prior failures were so persistent and frequent as to charge the servant with *knowledge* of the master's failure to discharge the *very duty* alleged to have been violated, the servant may act upon the assumption that it has been performed by his master. As to whether such prior failures have been so frequent and persistent as to charge the servant with knowledge of the master's breach of duty in the instance in question is a matter of fact for the jury and not for the court to determine. With the exception of that part which is too favorable to defendant, the portion of the charge under consideration is in accord with the decisions of the courts. (Missouri, K. & T. Ry. v. Hannig, 91 Texas, 347; Bonnett v. Galveston, H. & S. A. Ry. Co., 89 Texas, 72; Texas & P. Ry. Co. v. Eberheart, 91 Texas, 322; St. Louis S. W. Ry. v. Rea, 87 S. W. Rep., 324; Peck v. Peck, 87 S. W. Rep., 248.)

9. We can not perceive that the portion of the charge made the subject of the ninth assignment is obnoxious to the objection that it was calculated to induce the jury to believe that the court was of the opinion that any issuable fact submitted by it had been proved. Without any intimation on the part of the court as to its opinion on any of such facts, it appropriately submitted the issues raised by them to the jury for their determination, and clearly enunciated the law arising from such facts if found.

10. There was no error in the court's refusal to give the special charge requested by defendant's counsel as is complained of in the tenth assignment. It would be a strange doctrine which would relieve a railroad company from the consequences of a negligent act of its engineer in operating a train, because such engineer might, by the exercise of ordinary care, have known or foreseen that the company itself had been guilty of another act of negligence which concurred with his in causing injury to another servant. Special charge number seven referred to in the assignment was properly refused.

11. The eleventh assignment of error complains of this part of the court's main charge: "You are instructed that if you believe from the

evidence that the engineer of the train in question stopped the train on the occasion in question in the manner that was usual or customary for trains on defendant's road to be stopped under the same or similar circumstances, then the plaintiff assumed the risk from the manner in which the cars were stopped, and you will find for defendant on this phase of the case, although you may believe that had it not been for the manner in which the cars were stopped he would not have been injured." This is clearly the law upon the issue it submits of assumed risk. If the defendant deemed it too restrictive, and desired a charge to present any other matter affecting the issue of assumed risk than the manner of stopping the cars, it should have prepared and requested a special charge in regard to it. (Gulf, C. & S. F. Ry. Co. v. Hill, 95 Texas, 629; Ratteree v. Galveston, H. & S. A. Ry. Co., 81 S. W. Rep., 566; International & G. N. Ry. Co. v. Vanlandingham, 85 S. W. Rep., 847; Crowder v. St. Louis S. W. Ry. Co., 87 S. W. Rep., 166.)

12. The twelfth assignment complains that the verdict is excessive. It is a large one, but when the nature and character of plaintiff's injuries, his long and intense suffering, his age, and prior earning capacity are considered, it can not be said that the verdict shows that the jury were actuated by sympathy, passion or prejudice, nor are we able to say that the damages recovered exceed just compensation.

There is no error requiring a reversal of the judgment and it is affirmed.

Affirmed.

Writ of error refused.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS v. MARVIN A. NESBIT.

Decided October 17, 1906.

1.—Injury to Child—Employes with Defective Sight and Hearing—Negligence.

The engineer in charge of defendant's engine was partially blind and the fireman partially deaf. A child four years of age was struck and injured by the engine while attempting to cross the railroad track; for some time and distance before reaching the crossing the child was in plain view of the engineer and the purpose of the child to attempt to cross the track in front of the engine was evident. Held, if the infirmities of the engineer prevented him from seeing the child, then defendant was negligent in employing him; and if he could, by the exercise of ordinary care, have seen and known that the child intended crossing the track, then his negligence will be imputed to defendant.

2.—Child—Contributory Negligence.

The same rules can not be applied to children of tender years as to adults in the matter of negligence; such children can not be guilty of contributory negligence.

3.—Objectionable Argument—Absence of Exception.

Unless objection is offered to an argument at the time it is made, notice of the objection will not be taken on appeal.

4.—Failure to Introduce Witness—Hearsay.

Plaintiff proved by one of the attorneys for defendant that the conductor on the train that caused the injury was present at the trial, and defendant then sought to prove what the conductor testified to on a former trial. Held, properly excluded as hearsay.

5.—Child—Presumption of Danger—Negligence.

Defendant could not excuse its negligence on the ground that the child would not have been hurt if it had not fallen as it attempted to cross the track. Defendant had no right to assume that an infant four years of age could pass safely across the track in front of its moving engine. It was negligence to permit the exigency to arise.

6.—Verdict, not Excessive.

A verdict for $20,950 will not be set aside as excessive for injuries to a child four years old causing the amputation of one leg below the knee, the loss of a toe on the other foot, and wounds in the head, from all of which he suffered great agony, in the absence of something indicating that the verdict was the result of passion or prejudice.

Appeal from the District Court of Trinity County. Tried below before Hon. Gordon Boone.

T. S. Miller, Bean & Nelms and *Thomas & Rhea.* for appellant.—The action of the plaintiff in traveling along the pathway adjacent to the track on which the train was moving was not such as to cause an ordinarily prudent man, situated as defendant's employes were situated, to anticipate that he would attempt to cross the track immediately in front of the engine, and in a position of danger or peril, and the accident, therefore, was not the direct and proximate result of the negligence charged. Seale v. Gulf, C. & S. F. Ry. Co., 65 Texas, 275; Bush Electric Light & Power Co. v. Lefevre, 93 Texas, 604; Texas & P. Ry. Co. v. Bigham, 90 Texas, 225; Mutual Insurance Co. v. Tweed, 7 Wallace, 44; Milwaukee & St. P. Ry. Co. v. Kellogg, 94 U. S., 469; Scheffer et al. v. Washington, etc., R. R. Co., 105 U. S., 249; Chicago, etc., Ry. Co. v. Elliott, 55 Fed. Rep., 950; Galveston, H. & S. A. R. R. Co. v. Chambers, 73 Texas, 296; Galveston, H. & S. A. R. R. Co. v. Kiel, 60 S. W. Rep., 543; Chicago & A. R. R. Co. v. Becker, 76 Ill., 25, 36 Am. St. Rep., note page 87 et seq.; Berlin Mills v. Croteau, 88 Fed. Rep., 860; Texas & P. Ry. Co. v. Woods, 28 S. W. Rep., 416; Texas & P. Ry. Co. v. Beckworth, 32 S. W. Rep., 348; Rose v. Gulf, C. & S. F. Ry. Co., 17 S. W. Rep., 789.

The verdict of the jury was unduly influenced by the argument of T. H. Ball, Esq., in his closing remarks to the jury, wherein he gave the jury the benefit of his knowledge and acquaintance of the character and reliability of the plaintiff's witness, F. M. Court, as is more fully shown by this defendant's bill of exception on file in this cause, and the court erred in overruling this defendant's motion for a new trial on account thereof. District Court Rules, 38-41, 20 S. W. Rep., 14; Enc. of Pleading & Practice, vol. 2, 738; Hanna et al. v. Gulf, C. & S. F. Ry., 65 S. W. Rep., 495; Texas & P. Ry. v. Rea, 65 S. W. Rep., 1115; Ft. Worth & D. C. Ry. v. Lock, 70 S. W. Rep., 456; Phoenix Insurance Co. v. Stenson, 63 S. W. Rep., 543; Ft. Worth & D. C. Ry. Co. v. Burton, 60 S. W. Rep., 316; Halsey v. Bell, 62 S. W. Rep., 1088; Chicago, R. I. Ry. v. Jones, 81 S. W. Rep., 61; Missouri, K. & T. Ry. v. Huggins, 61 S. W. Rep., 976; Galveston, H. & H. Ry. Co. v. Cooper, 70 Texas, 67; St. Louis S. W. Ry. v. Boyd, 13 Texas Ct. Rep., 233; Bitterman v. Hearne, 32 S. W. Rep., 341; German Ins. Co. v. Harper, 67 S. W. Rep., 755; Wolffe v. Minnis, 74 Ala., 386; Browne v. Swine-

ford, 44 Wis., 282; s. c. 28 Am. Rep., 582; Cleveland Paper Co. v. Banks, 15 Neb., 20; s. c. 48 Am. Rep., 334; Union Central Life Ins. Co. v. Cheever, 36 O. St. Rep., 201; s. c. 38 Am. Rep., 273.

Whenever the rule which requires the argument to be confined to the evidence and argument of opposing counsel is violated, whether it was done intentionally, recklessly or wilfully, there is a violation of the rights of the opposing party to have the argument so confined, and a new trial will be granted unless it appears probable that the verdict was not influenced by the improper argument. Houston, E. & W. T. v. McCarty, 13 Texas Ct. Rep., 876, and authorities there cited; Gulf, C. & S. F. Ry. v. Jones, 73 Texas, 235; Galveston, H. & S. A. Ry. Co. v. Kutac, 72 Texas, 643; Western Union Tel. Co. v. Burgess, 60 S. W. Rep., 1023; St. Louis S. W. v. Holmes, 49 S. W. Rep., 659; Hunsock v. Roberts, 65 S. W. Rep., 675; Chicago, R. I. & T. v. Musick, 76 S. W. Rep., 221; Garritty v. Rankin, 55 S. W. Rep., 368; Galveston, H. & S. A. v. Wesch, 85 Texas, 593; German Ins. Co. v. Harper, 67 S. W. Rep., 755; Browne v. Swineford, 44 Wis., 282; Wolffe v. Minnis, 74 Ala. 386.

It is primarily the duty of the court to see that counsel confines his argument to the record, and it was not incumbent upon the defendant to request the court to charge the jury to disregard the improper argument, but it was sufficient on the part of appellant to call the court's attention to the improper argument, and reserve its exception thereto. District Court Rule, 41, 20 S. W. Rep., 14; Willis & Bro. v. McNeill, 57 Texas, 474; Willis & Bro. v. Lowry, 66 Texas, 541; St. Louis S. W. Ry. Co. v. Dickens, 56 S. W. Rep., 124; Wolffe v. Minnis, 74 Ala., 386; Browne v. Swineford, 44 Wis., 282.

The court erred in admitting the testimony of R. E. Oney on behalf of plaintiff over this defendant's objection to the effect that no effort was made to stop the train until after the child was struck; that he was on the fireman's side, and hallooed and waived, and if any attention was paid to his signals he did not see it, as more fully shown by this defendant's bill of exception on file in this cause, and the court further erred in overruling this defendant's motion for a new trial based on this error. Willis Bro. v. McNeill, 57 Texas, 474; Jones on Evidence, secs. 136, 137; Platner v. Platner, 78 New York, 90.

A party to the suit has the right to introduce evidence to explain why a witness was not offered. Houston & T. C. Ry. Co. v. Smith, 51 S. W. Rep., 506; Western U. T. v. Waller, 12 Texas Ct. Rep., 16; International & G. N. v. Wear, 77 S. W. Rep., 272.

The testimony of a person who heard a witness testify on a former trial of the same case is admissible, when offered for the purpose of showing what said witness testified on the former trial, even though the witness himself may be available. See authorities under first proposition under this assignment, and also Greenleaf on Evidence, sec. 100. McKelvy on Evidence, sec. 139; Smith v. Whittier, 30 Pac. Rep., 529 (see p. 532.)

H. L. Robb, Lovejoy, Houk & Love and *Andrews, Ball & Streetman,* for appellee.—An ordinarily prudent person, situated as were defendant's employes, would, in the exercise of ordinary care, have seen plain-

tiff traveling along the pathway adjacent to the track on which the train was moving, and have anticipated that plaintiff would attempt to cross the track in front of the engine, and the negligence of defendant's employes in failing to do so was the direct and proximate cause of plaintiff's injuries, and the issue was for the jury, which so decided. Missouri, K. & T. Ry. v. Nesbit, 13 Texas Ct. Rep., 656.

Plaintiff's injuries could have been avoided by the exercise of ordinary care upon the part of defendant's employes in charge of the train, and the evidence affirmatively shows that his injuries were due to their negligence. Missouri, K. & T. Ry. v. Nesbit, 13 Texas Ct. Rep., 656; Texas Pac. Ry. v. Horby, 67 S. W. Rep., 543; McGrew v. St. Louis, S. F. & T. Ry. Co., 74 S. W. Rep., 818; Livingston v. Wabash Ry. Co., 71 S. W. Rep., 137; Gulf, C. & S. F. Ry. v. West, 36 S. W. Rep., 101; Missouri, K. & T. Ry. v. Hammer, 78 S. W. Rep., 708.

Special charge No. 2 offered was correctly refused, because said instruction was vicious in principle and incorrect as a matter of law. It ignored the alleged negligence of defendant in employing a blind engineer and the alleged negligence of such engineer in the operation of defendant's train. The charge ignores the fact that there can be two concurrent proximate causes, and even though the fact that plaintiff fell on the track was one of the proximate causes of his injuries, it would not relieve the defendant, if its negligence in having a blind engineer, or one who operated its engine negligently, also concurred in causing the accident. Missouri, K. & T. Ry. v. Nesbit, 13 Texas Ct. Rep., 657; Gonzales v. City of Galveston, 84 Texas, 7; Missouri Pac. Ry. v. Somers, 78 Texas, 442; New York, T. & M. Ry. v. Green, 90 Texas, 257; Pope v. Riggs, 43 S. W. Rep., 306; Jackson v. Martin, 41 S. W. Rep., 837; Texas & N. O. Ry. v. Kelly, 80 S. W. Rep., 81, 82.

FLY, Associate Justice.—This is a personal injury suit instituted by appellee, a minor, through his father as his next friend, and on a trial by jury, resulted in a verdict and judgment for appellee in the sum of $20,950.

The grounds of negligence were alleged as follows: "Plaintiffs allege that the injuries to the said Marvin A. Nesbit were directly and proximately caused and occasioned by the negligence and carelessness of the defendant, its servants, agents and employes, in that defendant negligently had in its employment at the time of the accident to plaintiff an engineer and fireman operating the engine which injured plaintiff, said engineer and fireman being wholly incompetent for their respective positions, in that the engineer was partially blind and the fireman partially deaf, and their ability to keep a proper lookout or observe and hear signals or alarms when given, was greatly affected and impaired; that defendant, its agents and employes negligently and carelessly operated its engine and cars at said time, at and near said crossing and across the same, at Willard, Texas, in a dangerous, careless and improper manner, negligently and carelessly failing to keep any lookout for persons on or near said crossing, and particularly the plaintiff, Marvin A. Nesbit; that just before the said Marvin A. Nesbit entered upon said track, the defendant's servants in charge of said engine were warned by persons in proximity to the track, that said child was ap-

proaching said track, and notwithstanding said warning, defendant's servants failed and refused to stop said engine, and negligently and carelessly ran said child down; that at the time said warning was given, said engine was a considerable distance from said child, and that, if the engineer and fireman, in charge of said engine, had been competent to heed said warning, or had kept a proper lookout, or had used proper care and caution in the operation of said engine, they could have seen said child approaching and could have seen him enter upon said track, and could have seen the danger and peril to which the child was then and there exposed in ample time to have prevented injuring him."

The evidence discloses that appellee, at the time he was hurt was a child four years of age and, that in endeavoring to cross the railroad, he stumbled, fell and was struck and injured by a locomotive belonging to appellant. The accident occurred at a crossing in the town or village of Willard and was a much frequented crossing for the people of the town as well as those of adjoining towns. The boy was at a point on a platform to the north of the main line of the railway about 225 feet from the crossing, and the train, which consisted of the locomotive and two coaches, one a passenger and the other a combination coach, was at a water tank about 550 feet from the crossing. The platform from which the boy started was situated between two side tracks, the one nearest the main line running to a planing mill and the other to a saw mill. The boy started from the platform in a westerly direction along a much traveled foot path that ran between the two side tracks in the direction of a road that crossed both side tracks and the main track. When he got to the "dirt road" he turned directly south and after crossing the planing mill siding attempted to cross the main track at the usual crossing, and fell and was struck by the engine and carried for several feet and thrown from the track. At or about the time appellee started west along the side tracks to the road, the train which had stopped at a water station about 550 feet from the crossing, started for the crossing west of which was the platform used by passengers to enter and leave the train. The engineer who occupied a position on the north side of the engine was blind in his right eye, the one that was always to the outside of the track, and he was not looking along the track in front on the north side of the engine, but was looking across to the other side of the track and did not see the boy until the engine was almost or quite upon him, although he had, in plain and open view, traveled directly towards the railroad with the evident intention of crossing it, for 12 or 14 feet. We find that the fireman on the engine was so deaf that he could not hear the cries of warning given by parties who saw the danger in which the child was placed. There is evidence tending to show that the emergency brakes were not applied until after the child was struck. The child was in plain view when running parallel with the track, and it was negligence not to see him. We conclude that the evidence sustains the allegations of negligence. These conclusions of fact dispose of the first five assignments of error, which question the sufficiency of the evidence to sustain the verdict.

It is contended by appellant that one of the grounds of negligence alleged by appellee and submitted by the court was the failure to see

the child when it was traveling parallel with the track, but the record does not sustain that contention. The negligence alleged was a failure to see the child of tender years when he was approaching the track with the evident design of crossing it, and there is no mention of negligence when he was in any other position. The charge of the court follows the pleadings and bases the negligence of appellant on a failure of its employes to see the child when he was approaching the crossing, and does not mention the time while he was going in a direction parallel with the main track. The engineer, however, should have anticipated that the child was going to turn at the dirt road and attempt to cross the track, and when he had made the turn he should have anticipated, as all the bystanders did, that he was going to attempt to cross in front of the locomotive; and any man should have known that if a little four year old boy made such an attempt that he would be in a very dangerous and perilous position. Oney evidently anticipated danger to the child from the time he left the platform, because he says that he got up and watched the boy after he left the platform and as he kept coming the witness moved forward several steps and when the child started to cross witness moved toward the engine. Floyd Getsinger, a witness for appellant, stated that the boy was running trying to beat the train, and that he was just a little ahead of the train and that there was nothing to obstruct the view of anyone on the engine. Eliza Hall, another witness for appellant, seems to have anticipated that the boy would attempt to run in front of the engine even when he was running parallel with the track for she stated: "He aimed to make it down to the crossing to get across to the store." She further said: "I was looking at him coming to see him make it across, you know, and I noticed the train, too, was coming, and was looking to see whether it was going to catch him before he could get across or not."

As stated by the fireman, it was the duty of the engineer to look out for people that might be approaching public roads, but in this instance he either could not, on account of his defective vision see the boy, or made no effort to see him because he not only did not ascertain that appellee was approaching the track, but did not know of his presence on the track until he was called to by the fireman. If his infirmities kept him from seeing the child then appellant was negligent in employing him, and if he could by the exercise of ordinary care have known the child intended crossing the track then his negligence will be imputed to appellant. If he had seen the child he would have known that he intended to run across the track and that he probably would be injured in the attempt. Everyone in plain view of the place of accident seems to have seen the boy before he attempted to cross the track except the three employes of appellant on the engine.

If an adult had been running along a path parallel with the railroad towards a station, which was on the opposite side of the railroad, and the only means to get across to the station was a road crossing the track directly in front of the running man the engineer should have known from all the circumstances that the man was endeavoring to reach the station, but might have been justified in concluding that he would not attempt to cross the railroad directly in front of the train; but in the case of a child, four years of age, the engineer should have known, as

all the witnesses seemed to know, that the child was, from the time he left the platform, running a race with the train, and that if he got to the crossing ahead of the train that he would try to cross regardless of the danger. The same rules can not be applied to the actions of children of tender years as are applied to those of adults. The child was too young to be guilty of contributory negligence, too young to appreciate the dangers of his surroundings. An engineer with the power of vision that should be possession by an employe in so responsible a position would with the least degree of care have seen the child as he ran along in twelve or fifteen feet of the track, would have known what his object was, would have seen him when he made the turn at the dirt road for the crossing, and could and would have used means that would have protected the child. There is evidence tending to show that the train could have been stopped before injuring the child, even if proper means had been used after the child had reached the dirt road and turned directly towards the railroad, with the evident intention of crossing it. The child was not seen, however, and no effort made to stop the train until after he had been struck.

The sixth assignment of error complains of language used by T. H. Ball, Esq., counsel for appellee, in his closing speech to the jury. We learn from the bill of exceptions that Mr. Thomas, counsel for appellant, had criticised the testimony of Fred Court, a witness for appellee, and had said that Court was not willing to tell the facts in the interest of justice, but merely to oblige counsel. Mr. Ball said: "Mr. Thomas would not have argued this if he had known Court as his associates Mr. Bean and Mr. Nelms do. They tell you that they think him to be a conscientious man, and that he has told the facts as he believes them to exist. Why, because they know and I know that Court would not vary from the truth, as he understands it, for the whole M., K. & T. Ry. Co. of Texas; that all the gold that could be piled up in the courthouse would not cause him to shade his testimony a single iota, much less his friendship for me. And I say that to Mr. Thomas, as well as to you, here and now." No exception was taken to the language at the time it was spoken, but it was called to the attention of the court after the argument had been concluded.

It is the rule, as established by later decisions of the Supreme Court, that unless objection is offered to argument at the time it is made, notice of the objection will not be taken in an Appellate Court. (Moore v. Moore, 73 Texas, 362; Moore v. Rogers, 84 Texas, 1; Gulf, C. & S. F. Ry. v. Hockaday, 14 Texas Civ. App., 613.) As said in the cited case of Moore v. Moore: "It is peculiarly the office of an objection or exception of this character that it shall be made at the time of the act complained of, in order that the evil may be promptly remedied, and which it is presumed would be unhesitatingly done. But to allow without objection the continuation of such a line of argument would in some cases enable a party to take the chance of a favorable verdict, and which if adverse to him could be set aside upon objections which if promptly made would have resulted in a correction by the court."

It appears from the bill of exceptions that two of the counsel for appellant paid high tribute to the character of the witness Court, and it must be presumed that such commendation was fully as forceful and

effective with the jury as the testimonial offered by counsel for appellee, and the language of the latter could not have enhanced the reputation of the witness for truth and veracity. There was nothing in the language to inflame the minds or arouse the prejudices of a jury, and we think a case of negligence was fully made out without the evidence of Court, whose evidence differentiated from that of the other witnesses in no particular, except that he placed the boy farther from the engine when he fell than did the others. Appellant was guilty of negligence before the child reached the track, that rendered it liable.

The evidence of Valentine to the effect that the emergency brakes were not applied until the child was struck and dragged ten or fifteen feet was admissible to show that the employes on the engine did not know of the presence of the child on the track until it had been struck. It was also admissible to contradict the testimony of appellant's witnesses on that subject. The question of discovered peril did not figure in the case, but the failure of the engineer to see the child as it was entering danger was a material issue, and from the fact that he did not apply the brakes until after the child had been struck it could be reasonably inferred that he had not seen it. The same can be said of the evidence of Oney.

R. F. Bean, one of the attorneys for appellant, was placed on the witness stand by appellee, to prove that F. M. Wagner, the conductor on the train that caused the injury, was present at the trial, and appellant then sought to prove what Wagner testified to on a former trial. The evidence was properly excluded. If appellant desired to prove what Wagner knew, or did not know, about the case, it should have placed him on the stand. There is no rule by which the testimony could have been properly admitted. If Wagner did not witness the accident why not have introduced him to prove that fact, if it had any materiality? The evidence offered was hearsay of the clearest type. None of the authorities cited is applicable to the facts of this case.

The court did not err in refusing to give a special charge, requested by appellant, seeking to excuse it for its negligence on the ground that the child would not have been hurt if he had not fallen as he attempted to cross. Appellant had no right to assume that an infant of four years of age could pass safely across the track in front of its moving engine. It was negligence to permit the exigency to arise. This point was so decided on a former appeal of this case to the Court of Appeals of the First District, 88 S. W. Rep., 891.

Every issue raised by pleading and proof was clearly submitted by the court in its charge to the jury, and it was not error to refuse special charges requested by appellant. There is no merit in the criticisms of the charge of the court.

There was no evidence whatever tending to show that attention to other duties prevented the engineer from keeping a lookout along the track. It would be difficult to conceive of a case in which a railroad company could excuse its negligence in running over a child at a public crossing in a town or village, by proof that the engineer had other duties to perform that prevented him from keeping a proper outlook.

On the question of damages the court fully charged the jury, and did

not err in refusing additional charges on that subject tendered by appellant.

We can not sustain the contention that the verdict is excessive. The child had his right leg crushed so that it was amputated just below the knee and lost a toe on the left foot. He was severely wounded in the head and suffered great agony from his wounds. There is evidence tending to show that he may suffer and be inconvenienced through life from his injuries. There is no evidence of prejudice or passion upon the part of the jury. A verdict for $25,000 in case of the loss of a leg by a child three and a half years old, was affirmed by the Supreme Court of New York and approved by the Court of Appeals. (Ehrman v. Brooklyn City Ry., 14 N. Y. Supp., 336, same case 131 N. Y. App., 576.) It was held in that case that the size of the verdict did not evince the presence of passion or prejudice. The question of compensation must be left to the sound judgment of impartial and intelligent juries, and their verdicts should not be disturbed in the absence of something indicating that the verdict was the outcome of passion or prejudice. (Galveston, H. & S. A. Ry. v. Stevens, 15 Texas Ct. Rep., 977.)

There is no merit in the eighteenth assignment. Paragraph eight of the charge of the court on the measure of damages is clear and is not subject to the criticism that it is "erroneous, misleading and confusing." It is admitted by appellant that similar charges in a large number of cases have been approved by courts of last resort. The judgment is affirmed.

Affirmed.

Writ of error refused.

GEORGE R. MURPHY ET AL. v. THE SISTERS OF THE INCARNATE WORD, OF SAN ANTONIO, TEXAS.

Decided October 19, 1906.

1.—Orders of Probate Court Conclusive—Collateral Attack.

The Probate Court is one of general jurisdiction in matters pertaining to estates, and its orders and decrees must, upon collateral attack, be presumed valid, unless the orders themselves or the record of the proceedings affirmatively show want of authority in the court to make them.

2.—Same—Sale of Homestead—Minors—Estoppel.

Even though the record in an administration shows that the property in controversy was homestead, and plaintiffs were entitled to its use as such, and therefore the Probate Court was without jurisdiction to order its sale for the purpose of partition, yet the plaintiffs having actively joined in procuring the sale and having received and retained the purchase money, would be estopped from denying the title of the purchaser at such sale. And the same rule applies to minors and other persons under disability when represented by and acting through their duly appointed guardians, even though no order is obtained in the guardianship proceedings authorizing the guardian to join in procuring such administration sale or to accept the proceeds thereof.

3.—Mother's Estate—Disposition by Father—Estoppel.

When the surviving father assumed to dispose of the entire community estate by his will, evidence considered, and held to estop the children from claiming the interest of their mother in said estate disposed of by the father.

Appeal from the District Court of Smith County. Tried below before Hon. R. W. Simpson.

D. M. Reedy, for appellants.—To have justified the court in finding that the orders of the Probate Court were conclusive of the rights of plaintiffs and divested title out of them, the court should first have found that the will of Arch M. Murphy, or its prohibitive features, was annulled by a decree of the Probate Court, or that the will was not restrictive of alienation, or that the conditions against alienation had ceased before the sale. A will once admitted to probate must be executed according to the intent of the testator, if that can be ascertained from the will, unless the will is annulled by a direct proceeding instituted for that purpose in the court admitting it to probate. Rev. Stats., 1879, arts. 1938, 1941 (Rev. Stats., 1895, arts. 1991, 1992); Prather v. McClelland, 13 S. W. Rep., 545.

The court having found that this property was the community homestead of Arch M. Murphy and his deceased wife at his death; that Kate Murphy was an unmarried female, a child of said Murphy and wife, living with the family of Arch M. Murphy, and a constituent of it at the time of his death, and when this property was sold; the court should have found that it could not then be sold so as to deprive her of her homestead rights therein. Childers v. Henderson et al., 13 S. W. Rep., 481, and cases cited therein.

An independent executor can set aside the homestead for the use of minor children and unmarried daughters as fully and as effectually as the Probate Court could have done on the application of a guardian to have it so set aside; and he can do any other act necessary to set aside the homestead and exempted property for minor children and unmarried daughter, without any order of the court whatever. And his act in so setting it aside would be as effectual as if done under an order of the Probate Court. Roy v. Whitaker, 92 Texas, 357; McDonough v. Cross, 40 Texas, 280.

The court should have construed items 8 and 10 of the will as prohibiting the sale of this property, or its partition, so long as any child of the testator remained unmarried. Prather v. McClelland, 13 S. W. Rep., 545; Paschal v. Acklin, 27 Texas, 193; Laval v. Staffel, 64 Texas, 372.

H. M. Whitaker, for appellee.

PLEASANTS, ASSOCIATE JUSTICE.—This is an action of trespass to try title brought by the appellants against appellees to recover the title and possession of a lot and improvements thereon situated in the city of Tyler. The plaintiffs in the suit are George R. Murphy, Pinckney Murphy, Orville Murphy, Kate Murphy, a *non compos mentis,* who sues by her guardian, D. M. Reedy, T. J. Clay, Mrs. Susie Roy, joined by her husband, R. W. L. Roy, and Mrs. Willie Jenkins, joined by her husband, John Jenkins. The petition alleges that the plaintiffs are the owners in common of the premises sued for and that the right to the exclusive possession, use and occupancy of the property is in the plaintiff Kate Murphy and has been since the 1st day of January, 1890,

when she was dispossessed by defendant. Joint recovery of the fee and damages thereto is sought by all of the plaintiffs, and possession and rental value from January 1, 1890, is claimed for the plaintiff, Kate Murphy.

The defendant answered by general denial and plea of not guilty, and special pleas of limitation of three, five and ten years, and of improvements in good faith; and by further special plea in which it is alleged in substance that the property in question was purchased by defendant's vendor under an order made by the Probate Court of Smith County in the administration of the estate of Arch M. Murphy, deceased, through whom plaintiffs claim; that all of plaintiffs were before the court as parties in said administration proceedings, and said order under which said sale was made was obtained by the administrator at the urgent request of plaintiffs and those acting for them; that the money secured from said sale was paid over by the administrator to plaintiffs and was received by them with full knowledge of all the facts, and said sale was ratified and confirmed by plaintiffs, and they having received and continued to hold the consideration therefrom and having made no offer to return the same are estopped to deny the validity of the sale.

The trial in the court below was without a jury and resulted in a judgment in favor of defendant.

From the findings of fact filed by the trial judge we deduce the following as our conclusions of fact: The property in question was the community homestead of Arch M. Murphy and his wife, Elizabeth Murphy, the father and mother of plaintiffs. Elizabeth Murphy died intestate in 1878 or 1879. She left no debts and there was no administration upon her estate. Arch M. Murphy died on December 1, 1886, leaving an estate, the community property of himself and wife, valued at $60,000, and debts amounting to about $5,000. He left a will which was duly probated in the County Court of Smith County in March, 1887. His son, Arch M. Murphy, Jr., was named in said will as independent executor thereof and duly qualified as such executor. The will contained the following provisions:

"Item 6th. It is my further will and desire that my family shall occupy my homestead, so long as they or any of them shall remain single or desire to do so, and that my said son, A. Murphy, shall occupy the same as the head of the family and keep up said homestead and support and maintain said family out of my estate, until my youngest child shall become of age or shall marry, and if the said A. Murphy shall marry in the meantime, that he and his family shall also occupy said homestead, etc."

"Item 8th. It is my further will and desire that all of my property shall be kept together until my youngest child shall become of age or marry, except perishable property, which may be disposed of at the discretion and judgment of my executor, except also as I may direct herein."

"Item 10th. Excepting one-third undivided interest in my stock in trade in my jewelry store, one-third the tools and means used and invested in that business, which I have heretofore bequeathed to my beloved son, Arch, I bequeath and devise all of my estate, real, personal and

mixed of every kind and description to all my children who may be alive at my death, to share and share alike, subject to the charges thereon, in support, raising, maintenance and education of my children as before provided for herein and the legacy and compensation herein provided for Miss Lou Boulware. In this general provision is included A. Murphy, Katherine Murphy, Lena Clay, wife of Thos. Clay, Orville Murphy, Pinckney Murphy, George Murphy and Susie Murphy. But from Lena Clay's share is to be deducted $1,000 which was advanced to her on the occasion of her marriage. But as before stated it is my will and desire that my estate shall be kept together until my youngest child shall become of the age of 21 or marry, and my homestead not then to be divided until it shall cease to be a homestead for my children who may be unmarried. This clause is subject to this qualification and direction. I further direct that my executor shall pay to each one of my children who may be of age or marry, at my death, the sum of one thousand dollars, and to each one the like sum as they may respectively become of age or marry. This does not include Lena Clay; but is intended to make each one of the others up equal to her."

Arch M. Murphy, Jr., resigned as executor of said will in November, 1887, and died in April, 1888. Plaintiff, Kate Murphy, was an unmarried adult living with her father at the time of his death, and she continued to reside at the family homestead with her brother, Arch M. Murphy, until his death and thereafter resided there with her duly appointed guardian until the property was sold as hereafter stated. Arch Murphy, Jr., as head of the Murphy family, resided on this property continuously from the death of his father until his own death in 1888. Soon after his death plaintiff T. J. Clay with his wife Lena Clay moved into the Murphy homestead and assumed to act as head of the family. While living with her brother, Arch Murphy, upon the property in question plaintiff Kate Murphy became insane and has been *non compos mentis* ever since. T. J. Clay was duly appointed and qualified as her guardian in February, 1888, and after he and his wife took possession of the property upon the death of Arch Murphy, Jr., Kate, George and Susie Murphy, all of whom were wards of T. J. Clay, lived with them. Upon the resignation of Arch Murphy as executor in November, 1887, H. M. Whitaker was appointed administrator of the estate with the will annexed and continued to act in that capacity until the administration was closed several years thereafter.

On the 2d day of October, 1889, upon proceedings properly instituted by Orville Murphy, one of the plaintiffs herein, item eight of the will of Arch W. Murphy, Sr., before set out, was annulled by an order of the Probate Court of Smith County. All of the parties interested in the estate were before the court in that proceeding. Items six and ten of the will have never been annulled.

In 1890 H. M. Whitaker filed his final account as administrator and an application to make final settlement and distribution of the property of the estate among those entitled to receive it. This account and application shows an indebtedness due by the estate of $11,000, and that the property belonging to the estate consists of the homestead, a store house in the city of Tyler and a hotel known as the Ferguson house.

The account was approved and commissioners appointed to partition the estate. These commissioners reported that the property was incapable of partition. The appraised value of the property was fixed by said commissioners as follows: Homestead, $12,000; Ferguson House, $25,000; store house, $10,000. The final account and application for an order authorizing a disposition of the estate was filed by the administrator at the request of all the heirs, including the plaintiffs herein, the minor heirs and the *non compos mentis,* Kate Murphy, acting in that behalf by their duly appointed guardian.

Upon the report of the commissioners as above stated Mrs. Lena Clay, one of the heirs, and through whom the plaintiff T. J. Clay now claims, made it known to the court that she would take all the property at its appraised value, whereupon the court entered an order directing the administrator to convey all of the property to her upon the payment to him of the said sum of $47,000. This money was paid to the administrator by Mrs. Clay, and the property conveyed to her by him, and the conveyance so made reported to and confirmed by the court by an order which divested the title out of the heirs and vested it in Mrs. Clay. The plaintiffs were all before the court when each of the orders before mentioned were made. The title thus acquired by Mrs. Clay was by mesne conveyances passed to defendant on April 2, 1895.

The administrator after paying off the debts of the estate distributed the remainder of the amount received from Mrs. Clay among the heirs, the amount paid to each of said heirs being $4,800. The distributive shares of the minor heirs, George and Susie Murphy and the *non compos mentis,* Kate Murphy, were paid to their guardian, T. J. Clay.

None of this money has ever been refunded or offered to be paid the defendant by the plaintiffs, and all of the plaintiffs except Kate Murphy have accepted and received the benefit of their shares of said consideration for the sale of the property. The guardian of the minor heirs and of Kate Murphy was not authorized by any order of the Probate Court to accept the proceeds of the sale of his wards' interest in the property, or to expend any part thereof for or on behalf of his wards, and it is not shown that Kate Murphy ever received any part of said proceeds or that any part thereof was ever used for her benefit, and there is no evidence that she or her present guardian now have any part of same.

The defendant and all persons through whom they claim had at the time of their respective purchases both actual and constructive notice of the title and interest of the plaintiffs in this property under their father's will and as heirs of their mother.

None of the plaintiffs ever conveyed or otherwise disposed of their mother's one-half interest in the property unless such interest passed by the conveyance to Mrs. Clay before mentioned. Each of the plaintiffs inherited from their mother a one-seventh interest in one-half of the property. The defendant and its vendors have had exclusive and continuous adverse possession of the property since 1890 and have paid all taxes that have accrued thereon except for the years from 1895 to 1904 inclusive, during which time it was used for school purposes and therefore not subject to taxation.

The present value of the property is $12,000 and its rental value ever since its sale to Mrs. Clay has been $30 per month. It has been

damaged to the extent of $1,500 since it came into the possession of the defendant.

The ages and dates of the marriages of the several plaintiffs are not shown by the record, but the trial judge finds as a fact that all of the plaintiffs except George and Kate Murphy are barred by the five years statute of limitation.

Under appropriate assignments the appellants assail the judgment of the trial court upon the following grounds:

First, because the will of Arch M. Murphy prohibited the sale of the homestead so long as any of his children were minors and remained unmarried and it being shown by the evidence that Kate Murphy, one of the testator's children, was unmarried and was living upon the homestead at the time of its sale, the order of the Probate Court directing the sale of the property was void.

Second, because the court having found as a fact that the property in question was the community homestead of the father and mother of plaintiff Kate Murphy and that said plaintiff was a constituent of the family at the time of her father's death and is still unmarried, said property was not subject to sale and distribution so long as she desired to use it as a homestead and therefore the Probate Court had no authority to order its sale, and the trial court should have found the sale void at least insofar as it affects the right of said Kate Murphy to the use and occupancy of said premises.

Third, because the guardian of the plaintiff did not apply for and obtain an order of the Probate Court authorizing him to sell the interests of his wards in the estate of their father and mother and therefore the order of sale made by the Probate Court in the administration of said estate was unauthorized and void as to the interests of said wards.

Fourth, because the act of the independent executor, Arch M. Murphy, Jr., in taking possession of the property under the terms of his father's will and living thereon with the minor and unmarried children of his testator was a setting aside and dedication of said property as a homestead, and therefore the property was not subject to administration and formed no part of the estate in the hands of the administrator and was not subject to sale or distribution in that proceeding.

Fifth, because the Probate Court in the administration of the estate of Arch M. Murphy acquired no jurisdiction of the community interest of plaintiffs' mother in the property in question, no community debts having been shown, and therefore the sale under the order made in said administration did not pass title to plaintiffs' interest in their mother's portion of said property.

We think none of these objections to the judgment is valid. The Probate Court is one of general jurisdiction in all matters pertaining to the estate of deceased persons and its orders and decrees made in the administration of an estate must, upon collateral attack, be presumed valid unless the orders themselves or the record of the proceedings in which they were made affirmatively show want of authority in the court to make them. (Martin v. Robinson, 67 Texas, 374.)

If it be conceded that the record in the administration proceedings shows that the property was homestead and appellants were entitled to its use as such and therefore the court was without jurisdiction to order

its sale for the purpose of partition and no legal title passed by such sale, yet we think the trial court correctly held that appellants by their guardian having actively joined in procuring the sale, and the purchaser at said sale having paid the purchase price of the property, and appellants having received and accepted the benefit of same, such purchaser acquired an equitable title to the property which appellants are estopped from denying while retaining the benefits of the sale. (Dancy v. Strickling, 15 Texas, 557; Ryan v. Maxey, 43 Texas, 195; Stephenson v. Marsalis, 33 S. W Rep., 385.) The cases cited not only recognize and approve the doctrine of estoppel above stated, but hold that it applies to minors and other persons under disability, and that such persons are bound by the acts of their guardians in proceedings of this character notwithstanding the fact that no order was shown in the guardianship proceedings authorizing the guardian to join in procuring the administration sale or to accept the proceeds thereof on behalf of his wards.

The will of Arch M. Murphy undertook to dispose of the entire estate, and the application for partition and order of sale dealt with the property in its entirety. The amount paid by the purchaser and received and accepted by the appellants was the appraised value of the whole property. We think under these facts that the estoppel operates against appellants' claim to their mother's interest in the property as well as to the interest of their father.

We are of opinion that the judgment of the court below should be affirmed and it has been so ordered.

Affirmed.

INDEX.

Abandonment.

Of wife by husband. See *Divorce, 2.*

Abstract of Title.

Contract for perfect title. See *Deed, 2.*

Acknowledgment.

Of deed of partition. See *Married Woman, 1.*
Proof by subscribing witness. See *Record of Title, 1.*

1. The caption of a certificate of acknowledgment was, "State of Texas, Walker County;" following the name of the officer were the words and letters, "Notary Public, W. C. S. T." Held, the caption and the letters when taken together sufficiently indicate that the officer taking the acknowledgment was a notary public of Walker County, State of Texas. *Williams v. Cessna,* 315.

Action.

By county to prevent nuisance. See *Injunction, 1.*
By one of several joint owners. See *Joint Owners, 1.*

Administration.

Action by heirs after close. See *Heirs, 1.*

1. An order of the court probating a will and appointing an executor or administrator is prima facie evidence of the facts authorizing such order, including the death of the decedent. *Fischer v. Giddings,* 393.

Administrator's Deed.

1. An administrator's deed, more than thirty years old, contained a recital that the sale of the land thereby conveyed was made by order of the Probate Court having jurisdiction of the estate; the deed and probate records of the county were subsequently destroyed by fire; it was shown by the undisputed testimony of a son of the decedents that the grantors in said deed administered the estate under the Probate Court of said county; that the grantee in said deed purchased the land in controversy, through said administration proceedings and continuously and notoriously claimed it thereafter. Held, sufficient to show the authority of the administrator to sell the land. Under the statute in force in 1845 no confirmation of the sale was required. The records being destroyed, the recitals in the ancient deed were sufficient in themselves to show that the sale was made under the orders of the Probate Court. *Williams v. Cessna,* 315.

Adoption.

Effect upon previous will. See *Wills, 2.*

Advancement.

1. A deed to a child in consideration of love and affection is not necessarily to be taken as an advancement, and one upon valuable consideration could not be so taken. *Cowan v. Brett,* 570.
2. In the absence of a will or of circumstances sufficient to show otherwise a gift of money by a parent to a child is presumed to be an advancement. *Morrison v. Morrison,* 339.

Advancement—*Continued.*

3. Evidence considered, and held to show an intention on the part of an intestate to give to one of her children an amount of money in excess of the interest of such child in her estate, but no intention that such child should retain the money so given and share equally with the other heirs in the remainder of the estate. *Id.*

Adverse Possession.

Defined by statute. See *Limitation, 1.*
Intention at time of entry. See *Limitation, 2.*
Water barriers as enclosure. See *Limitation, 3.*
When limited to actual possession. See *Limitation, 4.*
Evidence held too indefinite. See *Limitation, 7.*
For purpose of acquiring title. See *Limitation, 8.*
Payment of taxes as evidence. See *Limitation, 10.*
Parties claiming under same deed. See *Limitation, 11.*
Under registered deed. See *Limitation, 12–14.*

Affidavit.

Of inability to pay costs. See *Appeal, 1.*

1. An affidavit of loss of a deed correctly described the lost deed by giving the names of the two grantors, the name of the grantee, the date, the number of acres conveyed and the location of the land, except that the initials of one of the grantors were stated to be J. H. instead of I. H. Held, an immaterial variance. *Williams v. Cessna*, 315.

Agency.

Authority to contract. See *Carriers of Freight, 1, 2.*
Accepting benefit of contract. See *Contracts, 1.*
Architect's certificate. See *Contracts, 11.*
Cattle tallied by agent. See *Contracts, 21.*
Letters between principal and agent. See *Evidence, 12, 13.*
Proof of existence and scope of. See *Evidence, 26, 30.*
Knowledge of agent. See *False Representations, 5.*
Right to commissions on sale. See *Land Agent, 2, 3.*
Revocation by death. See *Powers, 1.*
Of sender of telegram. See *Telegraph, 1.*
Local agent defined. See *Venue, 2.*

1. General managers of corporations have only such implied powers as are either necessarily incident to the exercise of their general authority, or such as are customarily exercised by general managers of like concerns. If the act by which the corporation is sought to be bound is out of the usual course of business of the concern, those dealing with the agent are bound to enquire as to the authority of the agent, or deal with him otherwise at their peril. Facts considered, and held that a corporation was not bound by the act of its general manager. *Manhattan Liquor Co. v. Magnus & Co.*, 463.
2. Facts considered, and held to warrant the defendants in assuming, from their course of dealing with plaintiffs through their salesman, that said salesman had full authority to bind plaintiffs by the contract of sale without submitting the same to plaintiffs for their approval. *Brennan & Son v. Dansby & Dansby*, 7.
3. It is incumbent on a principal to repudiate promptly a contract which his agent may undertake to make, but which is beyond the scope of such agent's apparent authority. *Id.*
4. When an agent, upon his own account, employs a subagent to assist him in his principal's business, the subagent must look to the agent and not the principal for compensation. *Houston C. O. M. & M. Co. v. Bibby*, 100.
5. A resident of another State owned a number of lots in a town in Texas; for the sale of said lots she appointed as her agent a party who did not live in said town and who, she must have known, could not give his personal attention to all the details in making sales; said agent, without express authority from the owner, appointed a local subagent

Agency—*Continued.*

to perform such merely ministerial acts as pointing out on the ground the lots to be sold; receiving offers to purchase and transmitting the same to the agent; and informing purchasers as to the proper description by number on the map of the town of the lots pointed out. Held, the power of the agent to delegate to the subagent the performance of such acts could be implied from his own agency; the acts of the subagent would be binding on the principal, and the mistake of the subagent in the description of a lot sold and conveyed by the principal would be held the mistake of the principal. *Wright v. Isaacks*, 223.

Alteration.

Burden of proving. See *Written Instrument, 2.*

Amendment.

Of appeal and error bond. See *Appeal, 1.*
Reducing amount in controversy. See *Jurisdiction of District Court, 3.*
1. It is within the discretion of the court to tax a party with costs as a condition of permitting a trial amendment to let in evidence excluded under previous pleading. *Smith, Administrator, v. Owen*, 412.

Amount in Controversy.

Jurisdiction of District Court. See *Garnishment, 5.*
Jurisdiction obtained by injunction. See *Jurisdiction, 1, 2.*
Interest as part of damages. See *Jurisdiction of County Court, 1, 2.*
Reduced by amendment. See *Jurisdiction of District Court, 3.*

Ancient Instrument.

Recitals in. See *Administrator's Deed, 1.*

Animals.

Dog killed on railroad track. See *Negligence, 23.*
Stock unlawfully at large. See *Railway, 1, 5.*
Defective gate to railway track. See *Railways, 2–4.*
Killed on unfenced railway. See *Railways, 6.*

Appeal.

Election of remedies. See *Certiorari, 1.*
Second review by certiorari. See *Judgment, 5.*
Rulings not presented by brief. See *Practice on Appeal, 1.*
Judgment sustained by estoppel. See *Practice on Appeal, 2.*
Mere preponderance of Evidence. See *Practice on Appeal, 3.*
Absence of statement of facts. See *Practice on Appeal, 4–6, 9.*
Issues undisposed of. See *Practice on Appeal, 7.*
Conclusions filed by trial judge. See *Practice on Appeal, 8.*
Injury presumed from erroneous charge. See *Practice on Appeal, 10, 11.*
1. Where in an appeal in forma pauperis the affidavit of inability to pay or secure the costs is made before a notary public of the county of the trial, and there is nothing in the affidavit or the record to show that proper proof of appellant's inability to pay the costs or any part of the same was made before the county judge of the county where appellant resides, or before the court trying the cause, the appeal will be dismissed. The statute concerning the amendment of appeal and writ of error bonds has no application to such case. *Wood v. St. Louis S. W. Ry. Co. of Texas*, 590.

Appeal Bond.

1. An appeal bond is necessary by one who, when sued in his individual capacity and as independent executor and as beneficiary under the will, defends in his individual capacity alone, and against whom judgment is rendered personally. *Tyson, Executor, v. Glass*, 178.

Architect.

Certificate of performance by. See *Contract, 11–15.*

Argument of Counsel.

1. Unless objection is offered to an argument at the time it is made, notice of the objection will not be taken on appeal. *Missouri, K. & T. Ry. Co. of Texas v. Nesbit*, 630.
2. An unwarranted argument by counsel that a contract relied on by defendant as a release of damages was void under the statute of frauds should call for an instruction from the court correcting its erroneous effect. *Gulf, C. & S. F. Ry. Co. v. Johnson*, 237.
3. When the evidence is conflicting improper statements of counsel for plaintiff in his closing argument, duly excepted to, is reversible error. *Texas & P. Ry. Co. v. Terry*, 591.

Arrest.

Sufficiency of warrant. See *False Imprisonment, 1.*
Warrant executed in wrong county. See *Sheriff, 2.*

1. An arrest by virtue of a void warrant is not excused, nor the detention of the prisoner made lawful, by taking him into the territory in which the warrant is effective. *Sneed v. McFatridge*, 593.
2. Under the provisions of section 1014 of United States Compiled Statutes of 1901, a justice of the peace of Clay County, Texas, upon complaint filed with him charging the offense of assault with intent to murder in the Indian Territory, was empowered to issue a warrant for the arrest of the plaintiff, and the defendant, the sheriff of Clay County, was authorized and it was his duty to arrest the plaintiff, charged with said offense, and to take him before one of the officers named in said statute for hearing. *Roberts v. Brown*, 206.
3. Under the provisions of section 1015, United States Compiled Statutes of 1901, only the judicial officer having jurisdiction to hear the complaint, and not the officer making the arrest, has authority to grant bail. *Id.*
4. The fact that the justice of the peace was mistaken in supposing that he was authorized by the State statutes to issue the warrant for the arrest of the plaintiff was immaterial since he was fully authorized by the United States statutes to do so. *Id.*

Assault and Battery.

1. The provisions of the Penal Code to the effect that no verbal provocation justifies an assault and battery, but insulting and abusive words may be given in evidence in mitigation of the punishment affixed to the offense, are declaratory of the general principle which applies in a civil suit for damages for assault and battery. *Parham v. Langford*, 31.
2. In a suit for exemplary damages for assault and battery, caused by slanderous words spoken of an inmate of defendant's family, it was not error to exclude testimony as to the bad character of the woman in a distant State many months prior to the assault, in the absence of evidence that the defendant knew of such character. *Id.*
3. Because there was no evidence to warrant it, it was error for the court to charge the jury that they might consider, in mitigation of damages, any action or conduct of plaintiff that was reasonably calculated to bring on or cause the assault by which he was injured. *Id.*

Assignment.

Covenant against subletting. See *Landlord and Tenant, 1, 2.*

Assignment of Error.

1. An assignment of error which embraces several separate and distinct questions of law will not be considered because too general. *Southern Kan. Ry. Co. of Texas v. Cox*, 80.
2. Assignments of error considered, and held not entitled to consideration because too general and because improperly grouped. *Waggoner v. Wyatt*, 76.

Assumed Risk.

Of riding on freight train. See *Carriers of Passengers, 11.*
Negligence unknown to servant. See *Master and Servant, 4, 5, 7, 8, 11.*
Usual manner of operation. See *Master and Servant, 7, 10.*
Negligence of fellow servant. See *Master and Servant, 14, 15.*

Attachment.

Disposing of sureties on bond. See *Judgment, 1.*
Reconvention for damages. See *Burden of Proof, 1.*

1. The plaintiff in attachment would not be liable for the value of a horse, seized by virtue of the attachment, which died while in the possession of the sheriff, unless the attachment was wrongfully sued out, and this though the negligence of the sheriff caused the death of the horse. *McFaddin v. Sims*, 599.

Attorney.

Misconduct in argument. See *Argument of Counsel, 1-3.*
Client concluded by act of. See *Judgment, 6.*
Letter to. See *Privileged Communication, 1.*
Rejection of title by. See *Specific Performance, 2.*

Banking.

1. A bank has the right to apply the amount of dividends that come into its hands on the note of its debtor. *Simpson v. Thompson*, 273.
2. A bank to which the purchaser in a sale paid money thereon to the credit of the seller, did not, by appropriating it, with the latter's consent, to his debt to itself, become liable to the purchaser depositing it, in his suit to rescind the contract and recover back the money paid. *Blair v. Baird*, 134.

Bill of Exceptions.

1. Where it does not appear that a bill of exception was taken to the admission of evidence, an assignment of error based thereon will not be considered. *Ferguson v. Morrison*, 396.
2. Since 1853 the rule has never been varied that a bill of exception must disclose the objections made to testimony. *Gulf, C. & S. F. Ry. Co. v. Pearce*, 387.
3. When the bill of exception fails to show what objection was made to the admission of testimony an assignment of error based thereon can not be considered. *Texas & P. Ry. Co. v. Terry*, 591.
4. At the foot of a bill of exception was the following statement signed by counsel for appellees, "Approved, except that we can not concur in the conclusion of what the answer of the witness will be." The bill was allowed by the judge without qualification. Held, the above statement was no part of the bill. *Kempner v. Patrick*, 216.

Bond.

Affidavit of inability to give. See *Appeal, 1.*
Forthcoming, to answer judgment. See *Foreclosure, 1.*
Maker not estopped to quash writ. See *Garnishment, 2.*
Disposition of case as to sureties. See *Judgment, 1.*
Liability of sureties on. See *Sheriff, 1.*

Boundaries.

Conflict in. See *Survey, 1.*

1. Where there was no ambiguity or uncertainty in the calls of a deed for boundaries, it was not proper to consider anything found on the ground, but not called for in the deed, as indicating the actual footsteps of the surveyor; his work must be tested by the calls in the grant. *Hamilton v. Blackburn*, 153.
2. A deed fixed the south line of the land conveyed only by course and distance from points not questioned and calls for stone mounds, as corners, which were not identified. Held, that the call for course and

Boundaries—*Continued.*

distance could not be affected by evidence of a survey of such line made years before the deed was executed, none of the work of such surveyor being called for in the deed. *Id.*

Briefs.

Matters not presented in. See *Practice on Appeal, 1.*

1. When assignments of error involving distinct and independent questions are merely copied into the brief and submitted as propositions, with a statement at the foot of each, "See statement of facts, ante," referring to a preliminary statement of the facts in the brief, such assignments will not be considered. *Gammon v. Sigel & Cohen*, 199.
2. A reference to another part of the brief of appellant where almost the entire evidence is copied is not such a statement under an assignment of error as the rules governing appeals contemplate. *Gulf, C. & S. F. Ry. Co. v. Pearce*, 387.
3. An assignment of error and proposition complaining of the charges given as inconsistent and contradictory followed by a statement giving five different instructions, embracing four pages of printed matter, without pointing out wherein the inconsistency lies, will not be considered. *Texas & P. Ry. Co. v. Horne & Warren*, 490.

Building Contract.

Architect's certificate of performance. See *Contract, 11–15.*

Burden of Proof.

Purchaser for value without notice. See *Equity, 1.*
Of compliance with contract. See *Sales, 4.*
Of alteration of contract. See *Written Instrument, 2.*

1. When the defendant in an attachment suit reconvenes for damages, the burden is upon him to show that the attachment was wrongfully sued out. *McFaddin v. Sims*, 598.

Caption.

Of transcript on appeal. See *Statement of Facts, 2.*

Carriers of Freight.

Liability for fall of market. See *Damages, 11.*
Unintelligible charge on damages. See *Practice on Appeal, 10, 11.*
Termination of transit. See *Interstate Commerce, 1.*

1. In a suit for damages for delay in transporting cattle to market upon a "feed in transit" contract, plaintiff was allowed to testify that in making the shipment from the station at which said cattle were fed, the same being a station upon an intermediate road and not on appellant's line of road, he made a contract with the agent at said station that plaintiff's cattle were to be transported through to destination without being unloaded and were to reach their destination in time for the market of a certain day, and that no other freight was to be picked up on the road by said train of cattle. Appellant objected to said testimony, because it was not shown that said agent had any authority to make such an agreement on behalf of appellant; because the same was beyond the scope of his authority; because it was not shown that said agent was the agent of appellant or had any authority to act for it, and because the evidence showed that said cattle could not be transported that distance in 28 hours and said contract was therefore illegal and void. Held, in view of the evidence in the case, the objections should have been sustained. Gulf, C. & S. F. Ry. Co. v. Jackson, 14 Texas Ct. Rep., 100, followed. *St. Louis & S. F. Ry. Co. v. Frazar*, 585.
2. The brakemen of a railroad company have no authority to tell a shipper that his cattle would not be transported on another line of road until a certain time and bind their own company by such statement. *Id.*

Carriers of Freight—*Continued.*

3. When the contract of shipment comprehends the entire distance from the initial point to destination a carrier bound by the contract can not relieve itself of the negligence of an intermediate carrier. *Id.*
4. The freight rates of railroads approved by the Interstate Commerce Commission are not binding upon the public unless posted and published as required by Act of Congress. *Southern Kan. Ry. Co. of Texas v. Cox*, 79.
5. Where the carrier neglected to note on the waybill and shipping contract of a shipment of mules that they were to be unloaded and fed at a certain point en route, as requested by the shipper, and in a suit for damages for such neglect the carrier plead that the plaintiff was guilty of contributory negligence in not having such omission corrected as soon as discovered after the transportation had begun, the testimony of the plaintiff to the effect that at a station on the route he saw a man in the depot whom he took to be defendant's agent and called his attention to the omission and suggested that he had better wire about it, was relevant and material on the issue of contributory negligence, and this, whether the man spoken to was or was not defendant's authorized agent. *Id.*
6. Where a carrier deviates a shipment from the route designated by the shipper it becomes liable for all damages resulting from its act, whether proximately or not. *Id.*
7. That the shipper had an arrangement with a third party by which the stock was to be unloaded at an intermediate point, and the shipper was to receive from such third party a rebate for the use of the cars from such point to the destination named in the shipping contract, can not affect the right of the shipper to have his stock routed as requested, with the privilege of unloading and feeding at a designated point, upon paying the customary freight rates. *Id.*
8. A petition seeking to recover from a railway excessive charges collected, with penalty for extortion, which substantially alleges that defendant charged and collected a greater rate for the use of the car than was fixed or authorized by law, held good as against general demurrer. *St. Louis S. W. Ry. Co. v. Rutherford*, 544.
9. The consignee of a car of freight, on payment of the transportation charges, was entitled to 48 hours clear time, exclusive of Sunday, to unload same; and where the carrier, after interfering with the unloading during a part of this time by switching the car to a place where it was impracticable, compelled payment of demurrage before permitting unloading to continue it is liable for the overcharge and penalty. *Id.*
10. The defense that the charge for demurrage was exacted innocently, in ignorance of the fact that the unloading had been interfered with by defendant during a part of the time allowed, must be pleaded by defendant, in order to be available. *Id.*
11. It being an issue on the trial as to which of two roads was liable for the delay of a shipment of cattle at the junction station, and at what time and place the connecting carrier assumed control of the cattle, it was error, because upon the weight of the evidence, for the court to charge the jury that it was the duty of the initial carrier to deliver said cattle to the connecting carrier at a certain one of two disputed points. The liability of the connecting carrier began whenever and wherever it assumed control of the shipment. *Texas & P. Ry. Co. v. Bailey*, 553.
12. The presumption that injury to a shipment of cattle occurred on the road of the last carrier does not obtain when the shipper accompanies the cattle. *Id.*
13. In a suit for damages in the transportation of live stock over two connecting lines of railway, errors in the instructions as to what would constitute delivery by the first line to the second are harmless as to the latter, where the verdict shows that all damages prior to the receipt of the shipment by it were assessed only against the initial carrier. *Texas & P. Ry. Co. v. Horne & Warren*, 490.
14. In an action against a carrier for failing to deliver goods received for

Carriers of Freight—*Continued.*

transportation, to which defendant answered that they were destroyed by fire, without its negligence, a supplemental petition alleging that their destruction was due to defendant's negligence was not subject to special demurrer for failure to show in what the negligence consisted, such pleading being in effect, only a denial of the matters alleged in defense. *Texas & P. Ry. Co. v. Turner*, 608.

15. The consignee, though not the owner of the goods lost, had such interest in them under the contract for shipment as entitled him to maintain action for their value. *Id.*
16. Because a contract of shipment did not bind the carrier to deliver the shipment at any particular time, the plaintiff was not thereby prevented from proving, under proper pleading, that the carrier was guilty of negligent delay in transporting the shipment. *Texas & P. Ry. Co. v. Stewart*, 399.
17. Evidence held sufficient to show negligent delay of cattle in transportation to market. *Texas & N. O. Ry. Co. v. Walker*, 278.
18. Plaintiffs shipped several carloads of calves from a point in Texas to a northern market intending to sell them as feeders, but because defendant's cattle pens, from which said calves were shipped, were infected by a contagious disease they could only be sold at a reduced price for immediate slaughter. Plaintiff proved the alleged difference in the price of feeders and of calves for slaughter, but made no proof of when, where, how or at what price the calves in question were sold, or that they were sold at all. Held, the case alleged was not proved. *Texas & P. Ry. Co. v. Beal & Self*, 588.
19. In a suit for damages caused to plaintiffs by shipping their cattle from infected pens, it was necessary to allege and prove that defendant knew that the pens were infected, or by reasonable care might have known it. *Id.*
20. A charge that it was the duty of defendant to have "proper and suitable shipping and feeding pens" is not warranted by an allegation that defendant had been notified by the federal authorities that its pens had been quarantined. *Id.*

Carriers of Passengers.

Alighting from moving train. See *Negligence, 8, 9.*

1. Testimony in regard to temporary absence of ticket seller of railway from office held to show that same was not kept open for half an hour before departure of train. *Gulf, C. & S. F. Ry. Co. v. Dyer*, 93.
2. The right of a railway to charge a passenger who has no ticket four cents per mile is conditioned by the proviso to the statute (Rev. Stats., art. 4542) upon its ticket office being kept open for half an hour before the departure of the train, irrespective of whether the passenger applied to purchase a ticket and was prevented from doing so by such failure. *Id.*
3. A passenger entitled to be carried on a train for three cents per mile and offering to pay that fare, is not bound to pay four cents when demanded in order to reduce the resulting damages, but may, without violence, stand on his rights, suffer ejection, and recover the damages resulting therefrom. *Id.*
4. Tender of the three cent per mile fare is not necessary where the four cent rate was demanded and nothing less would have been accepted. *Id.*
5. A railroad company contracted with plaintiff in the usual form to transport one carload of horses and the person in charge thereof from S., a station upon its line to its terminus, the same being a junction point with the defendant company; the horses were consigned to the plaintiff at T., a station upon defendant's road; the agent at S. issued a through waybill, showing the shipment to be from S. to T. via defendant's road; the shipping contract entitled the person accompanying the stock to return transportation to S. Evidence considered, and held sufficient to show that the defendant company, under the operation of art. 331a, Rev. Stats. of 1895, acted upon, ratified and made its own for all purposes the contract made by the initial carrier, and the

Carriers of Passengers—*Continued.*

person in charge of said horses was entitled to return passage over defendant's road. *Texas & P. Ry. Co. v. Lynch*, 121.

6. In a suit against a railroad company for failure to stop its passenger train at plaintiff's destination in order that plaintiff might alight, it appearing that plaintiff had no ticket to her destination but offered to pay full fare, the defendant answered that the train which plaintiff boarded was a fast passenger train which stopped only at the more important stations, not including plaintiff's destination; that the schedule of said train was regulated by a time card which was duly and regularly published; and that besides said fast train defendant operated daily another train which stopped at all stations for the accommodation of the local travel, to which class the plaintiff belonged. Held, defendant's answer was not subject to general exception. *Albin v. Gulf, C. & S. F. Ry. Co.*, 170.
7. It not being contended that plaintiff was entitled to damages solely on the ground of humiliating conduct on the part of the conductor toward her and independent of the legal right to eject her, errors in regard to testimony which concerns only the conductor's conduct can not have the effect of reversing the judgment. *Id.*
8. It is the duty of a person about to take passage on a train to inform himself as to its stopping according to the regulations of the company, and if he makes a mistake, not induced by the company, against which ordinary care would have protected him, he has no remedy against the company for the consequences. *Id.*
9. Having provided the public with adequate accommodations by means of regular trains for a daily passenger service between all stations, a railroad company is at liberty to run other trains stopping at certain stations only. *Id.*
10. It appearing from the testimony of the conductor that at certain stations, such as the one in question, it was the duty of the train porter to help the passengers to alight, a direction by the porter to the plaintiff to alight at the time he did so, was within the scope of his duty. *Texas & P. Ry. Co. v. Whiteley*, 346.
11. In a suit by plaintiff for personal injuries received while riding on a freight train in charge of stock, charges considered, and held to sufficiently and correctly present the law as to the risk assumed by plaintiff. *Texas & P. Ry. Co. v. Bump*, 297.
12. Plaintiff's wife went to defendant's depot to take one of its trains at 2:30 in the morning on January 23. The night was cold and bleak. Because the depot was closed and locked she was obliged to stand outside for 20 minutes. When the waiting room was opened there was no fire in the stove, and the train being late she waited in the cold room 40 minutes longer. Immediately thereafter she suffered from sore throat, pains in the chest, rigors and fever. Held, the evidence made a prima facie case as to the cause of her illness. *International & G. N. R. Co. v. Johnson*, 147.
13. The general rule is that from physical injury and pain, mental suffering will be implied without further proof. *Id.*
14. Defendant's train being late and plaintiff's wife not being advised when it would arrive, she had the right to remain in the waiting room until the train did arrive, and in doing so she was not guilty of contributory negligence. *Id.*

Cases Distinguished.

1. Wyllie v. Wynne, 26 Texas, 43; Lewis v. Durst, 10 Texas, 398; Woods v. Durrett, 28 Texas, 430, distinguished, and Timon v. Whitehead, 58 Texas, 295; Morris v. Brinlee, 14 Texas, 285, followed. *Waterhouse v. Corbett*, 512.

Cattle Shipment.

Authority of agent to contract. See *Carriers of Freight, 1, 2.*
Contract for through transportation. See *Carriers of Freight, 3.*
Route and deviation therefrom. See *Carriers of Freight, 5–7.*

Cattle Shipment—*Continued.*

Liability as between connecting lines. See *Carriers of Freight, 11–13.*
Negligent delay in transportation. See *Carriers of Freight, 16, 17.*
Placing in infected pens. See *Carriers of Freight, 18–20.*
Difference in market price. See *Damages, 11.*

Certificate.

Showing maker's official position. See *Acknowledgment, 1.*
Of performance by architect. See *Contract, 11–13.*
That deposition was sworn to. See *Deposition, 1, 2.*
Of copy of registered deed. See *Record of Title, 1.*

Certiorari.

To review probate order. See *Judgment, 5.*

1. A failure to appeal from an order of the County Court discharging an administrator does not preclude the remedy by certiorari, and the latter remedy is not dependent upon a showing why the remedy by appeal was not pursued. Nor will the fact that the administrator was discharged by order of the County Court, and the entire estate paid out, prevent the District Court from reviewing the proceedings in the County Court. *Friend, Administrator, v. Boren,* 33.

Challenge.

Prejudice against witness. See *Jury, 3.*

Charitable Bequest.

Description of beneficiaries. See *Will, 5, 8.*
To incorporated church. See *Will, 6, 7.*

Chattel Mortgage.

Misdescription of chattel mortgage. See *Name, 1.*

Children.

Injury by railway train. See *Negligence, 19–22.*

Citation.

In suit for delinquent taxes. See *Service by Publication, 1.*

Cities.

Title to public street. See *Dedication, 1.*
Proof of ordinance. See *Evidence, 4.*
Proof of city limits. See *Evidence, 5, 6.*

Class Legislation.

Rules governing occupation. See *Constitutional Law, 3.*

Collateral Attack.

On orders of Probate Court. See *Judgment, 7.*
Presumptions indulged in. See *Judgment, 8.*
Sale under dormant judgment. See *Judgment, 9, 10.*
Jurisdiction disproved by record. See *Judgment, 11–16.*

Commissioners' Court.

Deposit of county funds. See *County Depositories, 1.*
Presentation of claims to. See *County Treasurer, 1.*
Questioning validity of proceedings. See *Public Road, 1.*

Commissions.

On money received and paid. See *County Treasurer, 1.*

Common Source.

Of claim of title. See *Trespass to try Title, 1, 2.*

1. In trespass to try title, an agreement that the father is the common source of title does not preclude the children from showing that the land was community property, and claiming through their mother. *Taylor v. Doom,* 59.

Community Property.

Husband as source of title. See *Common Source, 1.*
Will of surviving husband. See *Estoppel, 4.*
Notes for purchase money. See *Homestead, 4.*
Partition with wife's consent. See *Homestead, 7.*

1. Land conveyed to husband and wife on a consideration paid from the wife's means did not become her separate property when the title was not acquired by the purchase but by limitation arising from possession under the deed for five or ten years. Such title was community. *Hamilton v. Blackburn,* 153.
2. Where land acquired jointly by husband and wife is owned by them in their respective separate rights, and is afterwards improved with community funds and a community debt incurred secured by lien on such improvements, the wife, after the death of the husband, has the right to convey her half interest in the land and all the improvements in satisfaction of said community debt, and such sale binds the children of the marriage as effectually as if they had made it themselves. *Olschewske v. Summerville,* 361.
3. In the community personal property of the first marriage, a second wife and the children of the first marriage would be entitled in the proportion of five-sixths to the children and one-sixth to such wife, and until partitioned they would hold and enjoy the same in said proportions. *Cox v. Oliver,* 111.

Compromise.

As consideration for agreement. See *Contract, 9.*

Condemnation.

Mistake in description of land. See *Eminent, Domain, 1.*

Conditional Sale.

1. When property is conveyed by one person to another under an agreement for a reconveyance upon the payment of a specified sum at some future time, such conveyance will be held as a conditional sale, provided it clearly appears that the right to repurchase is optional with the vendor, and the relation of debtor and creditor does not exist between the parties as to the agreed consideration for such reconveyance. If the consideration for the conveyance is a preexisting debt it must clearly appear that the debt is extinguished, otherwise the conveyance will be held a mortgage and not a conditional sale. *Blake v. Lowry,* 17.
2. In determining whether a conveyance absolute on its face, with a written agreement to reconvey signed by the grantee, is a mortgage or a conditional sale, reference will be had to the enquiry whether the relation of creditor and debtor continues to exist. If it does, it is a mortgage; if it does not, it is a conditional sale. In order to establish that a deed absolute on its face is a mortgage, this fact must be proved with clearness and certainty; and the same rule applies to an instrument which clearly shows upon its face to be a conditional sale. *Goodbar & Co. v. Bloom,* 434.
3. Where the defendant was indebted to the plaintiff, and executed to him an absolute deed for a house and lot, reciting therein a consideration of $1,000 in hand paid, and at the same time executed his note to the plaintiff for the balance of such indebtedness, and the plaintiff at the same time gave to the defendant an instrument in writing, styled "Refusal Memorandum," in which it was stipulated that the defendant should have the right to purchase the same premises at any time prior to a certain date named for the same amount of money,

Conditional Sale—*Continued.*

with interest, and the payment of said note, the trial court correctly held, in the light of the antecedent facts and the subsequent construction placed by the parties on said instruments, that the transaction was a conditional sale and not a mortgage. *Id.*

4. Whether or not a deed was intended by the parties as an absolute conveyance, or as a mortgage, is ordinarily a question of fact to be decided from all the evidence pertinent to it. The only safe criterion is the intention of the parties, to be ascertained by considering their situation and the surrounding facts, as well as the written memorials of the transaction. The character of the transaction is fixed at the inception of it and what the intention of the parties makes it. *Id.*

Consideration.

Recited payment of $1.00. See *Contract, 4.*
Unilateral agreement. See *Contract, 5–7.*
Release from former agreement. See *Contract, 8.*
Compromise of claim. See *Contract, 9.*
Agreement to support grantor. See *Deed, 7.*

Constitutional Law.

Shipment ceasing to be interstate. See *Interstate Commerce, 1, 2.*
Personal judgment against nonresident. See *Jurisdiction, 3.*

1. When an article of the statute to be amended is sufficiently identified by reference thereto in the title of the amendatory act, and the article amended itself sufficiently indicates the purpose of the amendment, the title of the amendatory act is sufficient. The object of the constitutional requirement that the subject of an act should be stated in its title is simply to direct attention to the subject to be legislated upon, and such subject is sufficiently indicated when the title gives the number of an article in the code in which it is included, or identifies an article which forms a part of the acts of a particular legislature. *Raymond v. Kibbe,* 209.
2. Chapter 90, of the Acts of the Twenty-ninth Legislature, concerning the taking of fish and oysters in Texas waters, considered, and held not subject to the objection that it embraces more than one subject, neither of which is expressed in the title. *Id.*
3. The taking of shrimp is treated by the Legislature as a distinct occupation; it therefore had a right to prescribe a distinct set of rules governing that occupation, and since the occupation is open to all men alike, upon compliance with the law, that feature of the Act in question is not subject to the objection that it is class legislation. *Id.*

Continuance.

1. An application for continuance to procure testimony to rebut testimony offered by the opposite party is addressed to the discretion of the court, and when the testimony offered by the opposite party is withdrawn the application for continuance is properly overruled. *Loring, Guardian, v. Jackson,* 306.
2. Where the original petition charged defendant with negligence which would probably result in death, and an amended petition, filed on the day of trial, alleged that death had occurred as the result of the negligence charged in the original petition, a second application for continuance by defendant on the ground of surprise was addressed to the discretion of the court, and it not appearing that such discretion was abused the action of the court in overruling said application was not reversible error. *Chicago, R. I. & G. Ry. Co. v. Groner,* 264.

Contracts.

Repudiation by principal. See *Agency, 3.*
Action by consignee though not owner. See *Carriers of Freight, 15.*
Ratification by connecting line. See *Carriers of Passengers, 5.*
Sale for preexisting debts. See *Conditional Sale, 1.*
Whether deed or mortgage. See *Conditional Sale, 2–4.*

Contracts—*Continued.*

Failure to furnish materials for work. See *Damages, 10.*
To provide a perfect title. See *Deed, 2.*
Delivery of instrument. See *Deed, 3.*
Description of land conveyed. See *Deed, 4, 5.*
Instrument not testamentary. See *Deed, 6.*
Consideration for conveyance. See *Deed, 7.*
Past due commercial paper. See *Indorsement, 2.*
Varying writing by parol. See *Evidence, 1–3.*
Customary method of contracting. See *Evidence, 28.*
For partition of estate. See *Executors, 2.*
Rescission on ground of fraud. See *False Representations, 1, 2, 7, 8.*
Release of claim for damages. See *False Representations, 4–6.*
Fee for collection. See *Indian Depredations, 1.*
Against subletting by tenant. See *Landlord and Tenant, 1, 2.*
By minor for necessaries. See *Minors, 2.*
Substituting new debtor. See *Novation, 1.*
Discharge of surety. See *Principal and Surety, 2–5, 7.*
Deed made by agent. See *Ratification, 1.*
Evidence held to show sale. See *Sales, 1.*
Implied warranty of quality. See *Sales, 2, 3.*
Burden of proving compliance. See *Sales, 4.*
Mortgage before completion of title. See *School Land, 2.*
Where title is doubtful. See *Specific Performance, 1, 2.*
Pleading written contract. See *Statute of Frauds, 1.*
Objection to proof by parol. See *Statute of Frauds, 3.*
To pay the debt of another. See *Statute of Frauds, 4.*
Refusal to pay purchase money. See *Superior Legal Title, 1, 2.*
Writings construed by court. See *Written Instrument, 1.*
Burden of proving alteration. See *Written Instrument, 2, 3.*
Varying writing by parol. See *Written Instrument, 4.*

1. One who accepts and takes the benefit of services performed by another under employment by an agent not authorized to employ, can not avail himself of his agent's lack of authority. *Watkins Ld. Mtg. Co. v. Thetford,* 536.
2. To justify a party to a contract in repudiating the same he must not be in default himself, and the breach of the other party must be without excuse. A party can not stand on and repudiate a contract at the same time. *Shurter v. Butler,* 353.
3. A promissory note and a cotton contract were executed at the same time, by the same parties and as parts of one transaction. In a suit upon the note, the contract was properly admitted in evidence. *Kempner v. Patrick,* 216.
4. The payment of one dollar as a consideration for the execution of a contract is a mere nominal consideration and is not of itself sufficient to support the contract. *Great W. Oil Co. v. Carpenter,* 229.
5. A contract which is unilateral and which places no obligation on one of the parties thereto is without consideration and not enforceable. *Id.*
6. A contract which binds the lessee unconditionally, and not at his option, to do specified work within a specified time upon the leased premises, is not unilateral or unenforceable for want of a consideration. The fact that the lessee can not be compelled to do the specific work agreed to be done by him, and that the remedy by suit for damages would prove inadequate, is immaterial. The lessor can not complain of a contract which he deliberately entered into. *Id.*
7. A contract of lease which imposed upon the lessee an unconditional obligation to sink one or more wells on the leased lands within eighteen months and to commence work on the first well within six months from date of contract, and which allows the lessee no option in the matter, is valid and enforceable; and the fact that the lessor reserves the right to terminate the lease upon default on the part of lessee does not render it otherwise. The cases of Hodges v. Brice, 74 S. W. Rep., 590; Emery v. League, 72 S. W. Rep., 606; Roberts v. McFaddin, 74 S. W.

Contracts—*Continued.*

Rep., 105; National Oil Co. v. Teel, 95 Texas, 586, discussed and distinguished. *Id.*

8. A release by the lessee of a part of the land embraced in the first contract is a sufficient consideration to support a second contract based upon and growing out of the first; and a release of all rights under the second contract was a sufficient consideration to support a third contract to convey a part of the leased land and pay a certain sum of money. *Id.*
9. Agreements made in good faith in compromise of claims, even though of doubtful validity, should be enforced. *Id.*
10. Where in the settlement of business transactions the defendant placed in plaintiff's hands a certain tract of land to be sold by him, and agreed to pay plaintiff a certain sum of money out of the proceeds of the sale of said land, such sum is not due until the land is sold. *Id.*
11. A contractor agreed to erect a building to the satisfaction of the architect, who was made agent for the owner, the contract providing that no certificate by him, as to performance, should be conclusive on his principal, except the final one. Held, that the architect's final certificate was conclusive that the contractor had complied with his undertakings, in the absence of fraud or gross negligence. *Carnegie P. L. Assn. of B. v. Harris*, 165.
12. An action for recovery of damages for the use of inferior materials, brought on the bond of a building contractor to perform his undertaking, is precluded, equally with one on the building contract itself, by the certificate of performance given by the architect, and which the contract had made conclusive. *Id.*
13. A building contract stipulated that the amounts expended by the owner, in case of default by the contractor, should be audited and certified by the architect; an itemized account of such expenditures was subscribed by the architect, and the architect testified that he approved and certified each of said items. Held, a sufficient compliance with the requirement of the contract. *McKenzie v. Barrett*, 451.
14. Where a building contract required the owner of the building to reserve in his hands twenty percent of the estimates of the architect made periodically of the material and labor furnished by the contractor, and also required the owner to pay to the contractor eighty percent of such estimates upon the certificate of the architect, the surety on the contractor's bond is not released by payments in excess of eighty percent of the value of the material and labor furnished by the contractor when such payments are made upon the certificates of the architect and without knowledge on the part of the owner that they are in excess of the limit fixed by the contract. *Id.*
15. Where there were several alterations in a building contract introduced in evidence by the plaintiff, the failure of the court to charge the jury that if any one of said alterations was made by the plaintiff after said contract was executed, such alteration would avoid the entire contract, would be affirmative error, provided the alteration was material. *Id.*
16. The suit being upon an account for goods sold and delivered at a stipulated price and the defenses being that the goods were of an inferior grade, and the contract for their purchase was made on Sunday, the court did not err in charging the jury to find for the plaintiff the market value of the goods in question, although the suit was for an agreed price, because the petition alleged that the market value and the agreed price were identical, and the defensive pleading and evidence raised the issue of market value. The defendant was liable for the market value of the goods irrespective of the validity of the contract. *Stewart v. Sachs & Co.*, 530.
17. The purchaser of property is not relieved from his obligations to the seller by the failure of a previous mortgagee to comply with contracts with the seller by which his mortgage was released, to which contracts the purchaser was not a party. *Gage v. Hunter*, 241.
18. Plaintiff conveyed to the city of H. a strip of land upon the sole con-

Contracts—*Continued.*

sideration of the undertaking and agreement on the part of the city to convert the same into a street and to build or assist in building a bridge across an adjacent bayou, all of which was to be done within a certain time specified. Evidence considered, and held to show that time was of the essence of the contract, and sufficient to sustain the judgment of the court cancelling the deed. *City of Houston v. Kapner*, 507.

19. One who pays money to another in consideration of the latter's agreement to furnish him with State and county license as a retail liquor dealer may recover back the money paid on failure to comply with such agreement, though he has pursued the occupation without license and without being disturbed by the county officers. *Richards v. Holford*, 417.
20. Where a contract for sale of ranch property provided for protection of the purchasers against any existing liens on same by depositing the obligations given by them in escrow, to be delivered to the vendor only on his producing releases of such liens, this was the sole remedy of the purchasers, and they could not rescind the contract because of misrepresentations by the seller as to the existence of liens. *Blair v. Baird*, 134.
21. Where, in a sale of ranch property, cattle thereon were to be paid for in accordance with their tallying by one selected as joint agent of the buyer and seller, such tally was the only delivery contemplated, and mistake or fraud in the tally by such joint agent did not afford ground for rescinding the contract unless participated in by the opposite party. *Id.*
22. A change in the method of distinguishing cattle tallied in a sale of ranch property from that agreed on by the purchaser, in order to be a ground for rescinding the contract, must be shown to have caused substantial injury to the purchaser. *Id.*
23. On a contract to take, at a fixed price, all of a certain stock of cattle that should be gathered by a named date, the purchaser was not required to take any subsequently gathered. *Id.*
24. Although the terms of a contract may all be agreed upon, still, if the parties make it a condition to the existence of a contract that the terms agreed upon be reduced to writing, and signed by them, there is no contract until this is done. *International Harvester Co. of A. v. Campbell*, 422.
25. In a suit to recover money advanced by plaintiff on a written contract to purchase land, and for damages for the failure of defendants to deliver possession of the premises contracted for, the principles applicable to specific performance of contracts may be looked to in determining the questions involved. *Greer v. International Stock Yards*, 370.
26. Where the contract provided that in the event the vendors failed to deliver possession of the premises in question within a certain time they should pay a stipulated sum as liquidated damages, and the vendee refused to accept the title tendered, he was not entitled to recover damages for failure to deliver possession of the premises. *Id.*

Contributory Negligence.

Passenger failing to inform himself. See *Carriers of Passengers*, 8.
Remaining in cold waiting room. See *Carriers of Passengers*, 14.
Assuming that master has performed his duty. See *Master and Servant*, 5.
Ascertaining whether cars were uncoupled. See *Master and Servant*, 7.
Injury by concurring negligence. See *Master and Servant*, 9.
Using defective ladder. See *Master and Servant*, 13.
Violation of rule of employer. See *Master and Servant*, 16.
Obeying order of foreman. See *Negligence*, 2, 3, 5.
Burden of proving. See *Negligence*, 6.
Charges held sufficiently full. See *Negligence*, 7.
Alighting from moving train. See *Negligence*, 8, 9.
Shipper failing to feed cattle. See *Negligence*, 10.

Contributory Negligence—*Continued.*

Drunken man on railroad track. See *Negligence, 11, 12.*
Care required of minor. See *Negligence, 20.*
Where right of way is unfenced. See *Railways, 1.*
Gate to private crossing. See *Railways, 3, 4.*
Footpath used by public. See *Railways, 11.*

Conversion.

Defining in charge. See *Instructions to Juries, 19.*
Of mortgaged crop by landlord. See *Landlord and Tenant, 5.*

1. One who participates in the conversion of mortgaged property is liable, whether he received the proceeds or not, and is not entitled to a charge limiting his liability to proceeds received by him. *Roche v. Dale*, 287.

Corporation.

Authority of general manager. See *Agency, 1.*
Conveyance and failure to organize. See *Deed, 1.*
Purchase of property by director. See *Estoppel, 1, 2.*
Pledge of stock by delivery. See *Pledge, 1.*
Bequest managed by corporate trustees. See *Will, 6.*

Costs.

On filing trial amendment. See *Amendment, 1.*

1. Plaintiffs sued for an entire tract of 300 acres; defendants answered by plea of not guilty and limitation; plaintiffs had judgment for 150 acres, and defendants for 150 acres; the court adjudged the costs against the plaintiffs, giving as a reason for so doing that the only issue in the case was the title to the 150 acres claimed and recovered by defendants. Held, error. The defendants might have filed a disclaimer as to the land they did not claim and so protected themselves against costs, but, having put in issue plaintiff's title to the entire tract, they should pay the costs. *Brown v. Humphrey*, 23.
2. It not appearing that anything was done in the trial court by defendant to have certain costs taxed against the plaintiff, the matter will not be considered by the Appellate Court. *Blain v. Park Bank & Trust Co.*, 359.
3. When the transcript contains superfluous matter not made the basis of any assignment of error the extra cost of such matter will be taxed against the appellant. *Missouri, K. & T. Ry. Co. v. Williams & Scoggin*, 550.

County Depositories.

1. Under the provisions of the Act of the Twenty-ninth Legislature, page 392, authorizing the selection of county depositories for county funds, when no bid is submitted for the entire amount of the county funds, the Commissioners' Court has the authority to select a depository for a portion of the county funds, the bid of such depository being for a part only of such funds, and in other respects in compliance with the law. *Worsham v. Dyer*, 43.

County Treasurer.

1. B. being county treasurer, the county endeavored to issue bonds to pay off a judgment against it, but on account of such judgment the approval and registry of the bonds was refused by the State officers. The county then procured a bank to buy and cancel the judgment. B. was succeeded in the office by E., after which the bonds were issued and sold and the bank paid out of the proceeds. Held (1), that the facts supported a finding that the transaction constituted a purchase of the judgment by the bank, and not a loan by it to the county, and that B. was not entitled to commission on the sum paid, as on money received and paid out by him as treasurer. (2) The county not appealing from so much of the judgment as allowed a recovery of the commissions by E., B., as appellant could not complain of the judgment on the ground that E.'s claim had not been first presented to the Commissioners' Court. *Benefield v. Marion County*, 245.

Covenant.

For removal of liens. See *Estoppel, 1, 2.*
Against subletting land. See *Landlord and Tenant, 1.*

Custom.

As to method of contracting. See *Evidence, 28.*

1. Evidence of a general custom in a particular locality as to certain transactions is material and competent, provided it is shown that the parties to such transactions knew of the same. If the custom was not confined to any particular locality knowledge of the same might be presumed. *Kempner v. Patrick,* 216.

Damages.

Provocation in mitigation of. See *Assault and Battery, 1.*
Death of attached animal. See *Attachment, 1.*
Deviation from designated route. See *Carriers of Freight, 6.*
Refusal to pay extra fare. See *Carriers of Passengers, 3.*
Goods received on invalid contract. See *Contract, 16.*
Agreement to furnish liquor dealer's license. See *Contract, 19.*
Agreement for liquidated damages. See *Contract, 26.*
Proving value of wife's labor. See *Death, 1.*
Previous claim for less amount. See *Evidence, 22.*
Market value of grass. See *Evidence, 34.*
Right to nominal damages. See *False Imprisonment, 2.*
Release procured by fraud. See *False Representations, 4–6.*
Recovery of double damages. See *Instructions to Juries, 24, 25.*
Correcting error in calculation of. See *Judgment, 2, 3.*
Interest on value of stock killed. See *Jurisdiction of County Court, 1, 2, 5.*
Amount reduced by amendment. See *Jurisdiction of District Court, 3, 4.*
Loss of crop in gathering. See *Pleading, 5.*
Alleging matters of evidence. See *Pleading, 6.*
Depreciation of value in delay. See *Pleading, 8.*

1. A charge to find for plaintiff whatever damages may have been "due him" is not reversible error in cases in which the damages recoverable are not capable of exact measurement. *Western U. Tel. Co. v. Stubbs,* 132.
2. Charge considered, and held not obnoxious to the objection that it permitted the jury to allow damages for loss of the society of the deceased nor for grief plaintiffs may have suffered. I. & G. N. Ry. Co. v. McVey, 87 S. W. Rep., 328, distinguished. *Texarkana & Ft. S. Ry. Co. v. Frugia,* 48.
3. Where the evidence showed a persistent and predetermined effort on the part of a trespasser to prevent the owner from using his property in his own way, it will support a claim for exemplary damages. *Waggoner v. Wyatt,* 76.
4. In a suit for the value of fruit trees destroyed by the negligence of defendant the difference in value of the land, on which the orchard was situated, before and after the destruction of the trees, is not the proper measure of damages. *Galveston, H. & S. A. Ry. Co. v. Warnecke,* 83.
5. The owner of land upon which growing trees have been destroyed by the negligence of another may either sue to recover damages for the injury to his land caused by the loss of the trees, or may sue for the value of the trees, and under some circumstances both claims for damage might be asserted. But the two causes of action are separate and distinct, and subject to different rules as to the measure of damage. In the latter case the measure of damage is the value of the trees when detached from the soil. Texas & Pac. Ry. Co. v. Gorman, 2 Texas Civ. App., 144, discussed. *Id.*
6. Plaintiff sued defendant for breach of contract to furnish water to make a rice crop. The proper measure of damages is the reasonable market value of his share of the crop which plaintiff failed to make, but which he would have made but for the default of defendant, less the additional expense of raising and marketing a full crop over and above

Damages—*Continued.*

the expense of raising and marketing the crop that was in fact made. *Dunlap v. Raywood Rice, C. & M. Co.*, 269.

7. Evidence considered and held, not to warrant the judgment. *Id.*
8. The measure of damage to a crop of rice by failure to furnish water to irrigate the same would be the difference between the value of the crop actually raised, less the cost of raising, harvesting and marketing the same, and the value of the crop which would have been raised if properly irrigated, less the cost of raising, harvesting and marketing the same. *McFaddin v. Sims*, 599.
9. In an action by a tenant to recover damages for the destruction of a crop of fruit by a fire caused by the negligence of a railway company in the month of January, the measure of damages is the difference between the value of the crop immediately before and immediately after the injury. Although the fruit may not have made its appearance at the time of the fire, it was in some stage of development which was arrested, and the crop thereby destroyed. The same rule applies as in cases of other annual crops. *Putnam v. St. Louis S. W. Ry. Co.*, 448.
10. B. sued S. for the price of brick furnished to construct a sewer. S. admitted the debt, but plead in reconvention for damages occasioned by delay on the part of B. in furnishing the brick as they were needed for the work, and as B. had contracted to do; the damages claimed were $10 per day liquidated damages paid to the city for delay in completing the sewer; expenses of a watchman during the delay; expenses of extra labor; and expenses of reexcavation occasioned by the delay. B. knew that S. was under contract to complete the work within a certain time, and that this could not be done unless the brick were furnished promptly as needed. When the first delay in furnishing brick occurred, S. threatened to buy brick elsewhere, but was dissuaded by B.'s agent, who promised that the brick should be promptly furnished. Held, it could not be said as matter of law that said damages were too remote, and the court erred in excluding evidence of the same. *Shurter v. Butler*, 353.
11. An instruction, in a suit for damage by delay of a shipment of cattle, that the measure of plaintiff's damage was the difference in the market price, if transported in the usual and ordinary time, and that realized on transportation in the time actually made, was not ground for reversal where the defendant asked and obtained an instruction relieving it from such liability if it used ordinary care and diligence in the transportation. *Missouri, K. & T. Ry. Co. v. Kyser & Southerland*, 322.
12. The principle on which plaintiff, suing for a breach of contract for his personal services, must deduct, from the compensation he was prevented from earning, whatever he could have made during the time in other employment, does not apply to contracts for other than personal service, such as contracts for railway construction. *Jefferson & N. W. Ry. Co. v. Dresson*, 282.
13. Where profits in another employment are to be deducted from plaintiff's damages for breach of a contract for his employment, he makes a prima facie case, by showing the profits he would have made under the contract, and it is for defendant to show that by its breach he has been enabled to make other profits in other employment. *Id.*
14. A verdict for $300 held not excessive damages for wrongful expulsion of a passenger from a train. *Gulf, C. & S. F. Ry. Co. v. Dyer*, 94.
15. Evidence considered and held to sustain a recovery of $5,000 for personal injury to a traveler on the highway, through his horse getting entangled in a wire negligently permitted to fall down by a telephone company. *Commercial Tel. Co. v. Davis*, 547.
16. A verdict for $2,000 held not excessive in suit for personal injuries to a woman 82 years old, feeble, and incapable of earning anything, but suffering pain therefrom, the suit being a continuation by her heirs of her action pending at her death, and not one for injuries from her death. *International & G. N. R. Co. v. Ellyson*, 46.
17. A verdict for $20.950 will not be set aside as excessive for injuries to a child four years old causing the amputation of one leg below the knee,

Damages—*Continued.*

the loss of a toe on the other foot, and wounds in the head, from all of which he suffered great agony, in the absence of something indicating that the verdict was the result of passion or prejudice. *Missouri, K. & T. Ry. Co. of Texas v. Nesbit*, 631.

Death.

Prima facie evidence of. See *Administration, 1.*

1. The value of the services of a wife is a matter not provable alone by an expert. The term services, as used at common law in relation to the labor performed and aid rendered by a wife, does not properly represent the dignity of the wife's work as a member of the matrimonial partnership. Her duties are those of a wife, and are not to be valued as those of a servant or hireling. The fruits of her labor belong to the community as do those of the husband, and the same rules that apply to the one apply to the other. The value of a wife's labor and aid is a matter of common knowledge, and when there is no testimony concerning it the jury may, upon a proper state of facts, proceed to estimate it according to their best judgment. *Chicago, R. I. & G. Ry. Co. v. Groner*, 264.

Dedication.

1. When an owner of land lays out and establishes an addition to a city and makes, exhibits and files in the county clerk's office a plat of said land, including in the plat streets and alleys, and sells the lots with clear reference to that plat, the purchasers of the lots acquire, as appurtenant to their lots, every easement, privilege and advantage which the plat represents as belonging to them, as part of the town, and title vests in the city in order that it may keep said streets in such a condition as that the traveling public may with safety pass over and along said streets. *City of Tyler v. Boyette*, 573.

Deed.

Recitals in ancient instrument. See *Administrator's Deed, 1.*
Whether taken as an advancement. See *Advancement, 1.*
Affidavit of loss of. See *Affidavit, 1.*
Reputation of maker as a forger. See *Evidence, 31.*
Possession under registered instrument. See *Limitation, 11.*
Claimant under forged deed. See *Innocent Purchaser, 1.*
Sufficiency of description of land. See *Limitation, 12, 13.*
Partition of real estate. See *Married Woman, 1.*
Parol contract of sale. See *Parol Sale, 1.*
Made by agent. See *Ratification, 1.*
Certificate of registration. See *Record of Title, 1.*
Proof by subscribing witness. See *Record of Title, 2.*

1. A number of persons intending to incorporate met, organized by electing officers and selected a corporate name; a deed was executed to them, the grantee being designated by the intended corporate name. Held, the deed was valid in equity, at least, and did not fail for want of a grantee, although the incorporation was never effected. *Smith v First Natl. Bank of Flatonia*, 495.
2. A contract to "provide" a perfect title means only that the deed shall convey a good and perfect title. It does not include the furnishing of an abstract showing perfect title. *Id.*
3. A creditor of the owner of a tract of land wrote to him offering a certain price for the land, and saying that if he did not wish to take the price offered, then to give him some showing for what he owed, and referred him to the creditor's attorney to "fix it up some way." The debtor went to the attorney named, presented the letter, and stated that he desired to convey the land to the creditor. A deed was prepared, signed and acknowledged by the debtor, and delivered by him to the attorney for the creditor. Held, a complete delivery, though the creditor was not notified of the matter until long after. *Elliott v. Morris*, 428.

Deed—*Continued.*

4. Every part of a deed must be given effect if possible, and the largest estate arising from its terms will be given to the grantee. But the intent of the parties, as in all contracts, when it can be arrived at from the deed, should prevail, unless contrary to law. *Schaffer v. Heidenheimer*, 366.
5. Where a deed, after describing the land conveyed by metes and bounds, contained a reference to another deed for a further description, and a repugnance is found to exist between the field notes given and the description in the deed referred to, the field notes will control. *Id.*
6. An instrument containing the usual formal parts of a deed, and containing also a stipulation that the conveyance is in trust for a third party, naming her, and giving the grantee or trustee power to sell, dispose of or convey the premises if in his judgment it was for the interest of the beneficiary so to do, but stipulating also that the premises conveyed should not be sold during the lifetime of the grantor except at her request or with her consent, is essentially a deed and took effect upon delivery. *Freeman v. Jones*, 332.
7. An undertaking on the part of a grantee of real estate to keep the taxes paid, the premises in repair and to supply the needs of the grantor, shown to be between 55 and 80 years of age, during her life, is a sufficient consideration to support a deed for property of the value of $2,000. *Id.*

Delivery.

Of obligation in escrow. See *Contract, 20.*
To attorney for grantee. See *Deed, 3.*

Depositions.

Postponement of taking. See *Evidence, 14.*

1. When depositions are attached to interrogatories filed in a case, and were taken in obedience to a commission issued out of the court in which the case is pending, and the caption to the interrogatories gives the correct style and number of the case, and the interrogatories and commission both show the court in which said case was pending, and the certificate shows that the deposition was taken in answer to said interrogatories, the case in which the deposition was taken is sufficiently identified. *McFaddin v. Sims*, 598.
2. The certificate of an officer taking depositions should show that the answers of the witness were signed and sworn to by the witness before the officer who took the deposition. *Id.*

Descent and Distribution.

Community personal property of first marriage. See *Community Property, 3.*
Partition of estate. See *Executor, 1, 2.*

Description.

Of premises conveyed. See *Deed, 4, 5.*
Of land in recorded deed. See *Limitation, 12, 13.*
In conveyance of land. See *Parol Sale, 1.*
Of property to be taken by writ. See *Sequestration, 2.*

Directors.

Purchasing property of corporation. See *Estoppel, 1, 2.*

Disclaimer.

Protecting against liability for cost. See *Costs, 1.*

Discovered Peril.

Charges on approved. See *Negligence, 13, 14.*
Presuming man will leave track. See *Negligence, 15.*
Failure to use means at command. See *Negligence, 16.*
Child intending to cross track. See *Negligence, 19–22.*

Divorce.

Subsequent mortgage of homestead. See *Homestead, 6.*

1. If the jury were authorized to presume a divorce from the fact of separation and remarriage of the husband six years later with another who thereafter lived with him as his wife, such presumption was not one of law which the court could give in charge to the jury. *Hammond v. Hammond,* 285.
2. A divorce was properly refused the husband on the ground of abandonment upon evidence showing that the wife accused him of squandering upon lewd women all that she and her children could make (which the husband denied) and declared that she would see him dead and in hell before she would live with him another year; that thereupon the husband and wife by mutual consent divided the land constituting the homestead, the wife remaining in the dwelling and the husband moving into a tenant house upon the same place. Such separation having continued for more than three years, it appearing therefrom that the husband himself performed the physical act of leaving his wife and remaining away for the statutory period. *Gray v. Gray,* 348.

Elections.

Controlling calling of conventions. See *Political Party, 1.*

Eminent Domain.

1. In a proceeding to condemn two tracts of land for railroad purposes, by mistake only one of said tracts was described in the petition, which fact was unknown to any of the parties and the proceeding was conducted in all respects as for the condemnation of the two tracts; the award referred to the petition for description of the land condemned; the judgment was written accordingly; the defendant discovered the mistake, but remained silent and accepted the entire amount of the award, and thereafter denied the right of the railroad company to appropriate and use the tract omitted from the petition and judgment. Held, that a court of equity will correct the mistake and make the award and judgment show what they were in fact intended to show. *Getzendaner v. Trinity & B. V. Ry. Co.,* 66.
2. The conditional paramount right of the State to take private property for public use becomes absolute when compensation has been assessed or agreed upon in any manner, and is paid. *Id.*

Endorsement.

1. The genuineness or sufficiency of an endorsement as a transfer of a promissory note can not be questioned under our statute except by sworn pleading. *Mayfield Groc. Co. v. Price & Co.,* 391.
2. Past due commercial paper is degraded to the rank of a personal chattel, and the purchaser acquires only such title as the seller had. This rule does not apply, however, when the endorsement is in such language and terms as evidence ownership of the note in the person to whom it is transferred. *Id.*
3. At the request of the holder of a note, an endorser thereof agreed that the time of payment might be extended in consideration, and upon the undertaking of said holder returning to the possession of the maker certain property mortgaged to secure the payment of said note. The note was extended, but the property was never returned, as stipulated by the endorser. Held, the endorser was thereby released. *Long v. Patton,* 11.
4. The release of the maker of a note releases the endorser also. *Id.*

Estates of Decedents.

See *Administration; Administrator's Deed; Advancement; Appeal Bonds; Executors; Wills.*

Action by heirs. See *Heirs, 1.*

Charging legacy with debt. See *Wills, 3.*

Equity.

Right to jury trial. See *Jury, 1.*
Report of master. See *Master in Chancery, 1, 2.*
Title to land in. See *Parol Sale, 1.*

1. The purchaser of land at a legal and regular execution sale under judgment against the holder of the legal title, becomes vested with the legal title, and the holder of an equity must prove that such purchaser was not a purchaser for value without notice. *Taylor v. Doom,* 59.

Escrow.

Delivery of obligations in. See *Contract, 20.*

Estoppel.

To quash writ of garnishment. See *Garnishment, 2.*
Judgment sustained by. See *Practice on Appeal, 2.*
Consent to opening roads. See *Public Road, 1.*

1. Directors of a corporation who made sale of its property covenanting to remove all liens therefrom, were estopped from asserting title thereto against the purchasers, through a sale afterwards made under a previously executed mortgage, assented to by the stockholders, securing a pledge of the bonds of the company for their own claims against it. *Parker v. Citizens' Ry. Co.,* 168.
2. Breach by the purchasers of a street railway line of their contract to continue its operation, being a condition subsequent, did not avoid the effect of an estoppel on the vendors from enforcing liens against which they had warranted. *Id.*
3. Even though the record in an administration shows that the property in controversy was homestead, and plaintiffs were entitled to its use as such, and therefore the Probate Court was without jurisdiction to order its sale for the purpose of partition, yet the plaintiffs having actively joined in procuring the sale and having received and retained the purchase money, would be estopped from denying the title of the purchaser at such sale. And the same rule applies to minors and other persons under disability when represented by and acting through their duly appointed guardians, even though no order is obtained in the guardianship proceedings authorizing the guardian to join in procuring such administration sale or to accept the proceeds thereof. *Murphey v. Sisters of I. W. of S. A.,* 638.
4. When the surviving father assumed to dispose of the entire community estate by his will, evidence considered, and held to estop the children from claiming the interest of their mother in said estate disposed of by the father. *Id.*
5. One who takes property under a will is estopped from claiming, adversely to the provisions of such will, other property therein devised to another. *Torno v. Torno,* 117.

Eviction.

1. Evidence considered, and held insufficient to support the judgment for damages against defendants for an alleged unlawful eviction. *Cox v. Oliver,* 111.

Evidence.

Of facts authorizing order. See *Administration, 1.*
Authority to sell land. See *Administrator's Deed, 1.*
Intention in gift to child. See *Advancement, 1–3.*
Mitigation of damages. See *Assault and Battery, 1–3.*
Failure to save exception. See *Bill of Exceptions, 1.*
Showing objections made to. See *Bill of Exceptions, 2, 3.*
Showing what answer of witness would have been. See *Bill of Exceptions, 4.*
Restricted to calls in deed. See *Boundaries, 1, 2.*
That attachment was wrongful. See *Burden of Proof, 1.*
Authority of agent to contract. See *Carriers of Freight, 1, 2.*
On issue of contributory negligence. See *Carriers of Freight, 5.*

Evidence—*Continued.*

Presumption against last carrier. See *Carriers of Freight, 12.*
Error held harmless. See *Carriers of Passengers, 7.*
Prima facie, of cause of illness. See *Carriers of Passengers, 12.*
Mental suffering implied. See *Carriers of Passengers, 13.*
Contracts executed at same time. See *Contracts, 3.*
Presumption as to knowledge of custom. See *Custom, 1.*
Profits in other employment. See *Damages, 13.*
Value of wife's labor. See *Death, 1.*
Identifying case in which taken. See *Depositions, 1.*
Certificate that answers were sworn to. See *Depositions, 2.*
Purchaser for value without notice. See *Equity, 1.*
Sufficient to establish forgery. See *Forgery, 1.*
Other proof of same fact. See *Harmless Error, 1.*
Comments of judge upon. See *Harmless Error, 2.*
Presumption rebutted. See *Judgment, 8.*
Failure to render for taxes. See *Limitation, 5.*
Should not be pleaded. See *Pleadings, 6.*
Reading excluded pleadings. See *Practice in Trial Court, 3.*
Hearing to determine admissibility. See *Practice in Trial Court, 4.*
Statements to attorney. See *Privileged Communication, 1.*
Burden of proving ratification. See *Ratification, 1.*
Burden of proving compliance with contract. See *Sale, 4.*
Documentary evidence in record. See *Statement of Facts, 4.*
Objection to proof by parol. See *Statute of Frauds, 3.*
That certificate was filed with surveyor. See *Survey, 3.*
To show common source of title. See *Trespass to Try Title, 1, 2.*
Burden of proving alteration. See *Written Instrument, 2.*
Varying written contract by parol. See *Written Instrument, 4.*

1. Objections to parol evidence as varying a written contract do not apply to an action to recover for fraud therein. *Karner v. Ross*, 542.
2. Defendant, at the time the conveyance was executed to him for the land in controversy, gave to plaintiff the following writing: "This is to certify that James Roland this day conveyed to me a tract of one acre of land, and when W. P. Blake pays me $28.20 and interest, and costs of new transfer, I agree to reconvey said acre of land to W. P. Blake on demand." Held, in the absence of mistake or fraud, parol evidence was not admissible to show that defendant held said land as security for other indebtedness due him by plaintiff than that named in said writing. *Blake v. Lowry*, 17.
3. It was error to exclude evidence offered by plaintiff to show that its failure to irrigate defendant's rice crop was due to the failure of defendant's landlord to keep in repair a lateral ditch which said landlord had agreed to do when renting the land to defendants. This evidence would not have varied the written contract between plaintiff and defendants, but only shown the circumstances under which it was executed. *Gravity Canal Co. v. Sisk*, 194.
4. Where the charter of a city provided "that the ordinances, resolutions and by-laws of the city council may be proved prima facie by a book of printed ordinances of the city appearing to be printed by the authority of the city," a printed book of ordinances purporting on its title page to have been printed by authority of the city council of such city was properly admitted in evidence. *Texarkana & Ft. S. Ry. Co. v. Frugia*, 48.
5. The testimony of a witness as to what a deceased officer of the city told him as to the locality of the city limits is hearsay and properly excluded. *Id.*
6. Testimony that the city did not exercise jurisdiction over a certain piece of property is not evidence that such property is not within the city limits. *Id.*
7. When it does not appear what the testimony of the witness was, nor that it was material to appellant it can not be determined whether or not it was harmful error for the court to admit testimony attacking the reputation of such witness for truth and veracity. *Id.*

Evidence—*Continued.*

8. Declarations of a party to the suit are admissible against him without laying a predicate in his examination for impeaching him thereby. *Karner v. Ross*, 542.
9. Plaintiff proved by one of the attorneys for defendant that the conductor on the train that caused the injury was present at the trial, and defendant then sought to prove what the conductor testified to on a former trial. Held, properly excluded as hearsay. *Missouri, K. & T. Ry. Co. of Texas v. Nesbit*, 630.
10. Without producing the books of the bank the cashier may testify to the fact that a certain item of money was placed to the credit of a certain party on the books of the bank. *Smith v. First Natl. Bank of Flatonia*, 495.
11. Facts proven but not alleged can not form the basis of a recovery. *Id.*
12. A letter by plaintiff in the suit to his own agent was not admissible against defendant in the absence of evidence to connect defendant with or bind him by such letter. *Blair v. Baird*, 134.
13. A letter and telegram from plaintiff's agent at the stock yards are incompetent evidence of market values at the times stated therein. *Missouri, K. & T. Ry. Co. v. Williams & Scoggin*, 550.
14. Where the agent of the opposite party appeared at the time and place stated for taking the deposition of a witness, but the taking of such deposition was postponed to a later date without objection on the part of such agent, the postponement is not ground for quashing the deposition. *Id.*
15. Evidence considered and held sufficient to qualify a witness experienced in shipping cattle over a certain route to testify as to the reasonable time required for their transportation. *Texas & N. O. Ry. Co. v. Walker*, 278.
16. The question being whether or not the shipment of stock in question compared favorably with a previous shipment, it was not error to permit the plaintiff to testify as to his opinion on the matter, since such fact is altogether a question of opinion evidence. *Texas & P. Ry. Co. v. Stewart*, 399.
17. Where witnesses simply testified as to instances in which they had seen similar trains stop at the same place and the distance within which they were stopped, their testimony was not subject to the objection that they were not qualified to testify as to such matters because they had had no experience in operating trains. *Texas & P. Ry. Co. v. Brannon*, 531.
18. The testimony of a witness for defendant, who was qualified to testify as an expert, "that he failed to find, from examining the wreck, any cause which produced it, and that it often happened in railroading that wrecks occur, and a careful examination fails to disclose any cause for it, and the wreck in which plaintiff was injured was one of that kind," was not subject to the objection that it was irrelevant and immaterial, and should have been admitted. *Southern Kan. Ry. Co. v. Sage*, 38.
19. Where in a suit for personal injuries the defendant pleads contributory negligence on the part of plaintiff, testimony of the plaintiff tending to disprove the charge of contributory negligence is admissible under the pleading of the defendant, though not under that of plaintiff. *Id.*
20. Where it appears from the record that testimony excluded at one time during the trial was admitted at another, the error in the ruling of the court, if any, was harmless. *Id.*
21. An expert may testify that certain conditions shown by the evidence would produce pain. *Western U. Tel. Co. v. Stubbs*, 132.
22. Plaintiff's suit being for $1,000 it was error to exclude testimony offered by defendant to show that plaintiff had claimed only $25 before filing suit. *Id.*
23. The genuineness of a writing may be proved by indirect or circumstantial evidence. Where a letter was written upon the letterhead of the defendant; was addressed to its agent, and was shown by him to plaintiff, and the signature to said letter was the same as that affixed to

Evidence—*Continued.*

other letters written by defendant; and where defendant had been duly notified to produce said letter and failed to do so without excuse or denial of its existence or possession, these facts when taken in connection with the contents of the letter itself were sufficient proof of the genuineness of such letter. *International Harvester Co. of A. v. Campbell*, 421.

24. The general rule is that objection to testimony must be made when it is offered, and if not made then it will be considered waived and its admission no ground for a new trial. *Id.*

25. When an instrument is such as would naturally be in possession of the adverse party or his agent, and when last seen was in such possession, and the party after being duly notified refuses to produce or account for it on the trial, secondary evidence of its contents is admissible. *Id.*

26. Evidence that the same agent who employed plaintiff employed another person to work for the defendant was a circumstance to be considered by the jury in determining the scope of such agent's authority. While mere proof that a person assumed to act as the agent of another is not alone sufficient to establish agency as against the principal, yet if it is further shown that the alleged principal knew or must have known of the acts of the alleged agent and made no objection, it may be sufficient. *Id.*

27. The following interrogatory was propounded to a witness: "Had you at any time, as such division manager, or has there passed through your hands as such division manager, or is there known to you, any contract by which plaintiff was employed as canvasser, solicitor or drummer for any territory operated by the Plano Division of defendant company during the year 1903? If your answer be yea, state when, under what circumstances, and attach such contract, or copy thereof, if such has ever come into your custody and under your control or within your knowledge." To which the witness answered: "I had not. There has not been, and there is not, such a contract. No such contract ever existed." Held, the statement "no such contract ever existed" was properly excluded as a conclusion of the witness. *Id.*

28. Proof of a contract vel non can not be made by showing the customary method of either party in making such contracts. *Id.*

29. The erroneous exclusion of testimony is harmless when there is other testimony in the record to the same effect and not objected to. *Id.*

30. A witness was asked: "Is it not a fact that prior and subsequent to the employment of plaintiff, C. employed agents and salesmen for defendant company in other places than San Antonio, Texas?" To which he answered: "C. had no authority to employ an agent or salesman in any territory in the Plano Division of the defendant company, and he had never employed any one therein." Held the first part of the answer, relating to C.'s authority, was properly excluded as hearsay, but if not hearsay it was a conclusion or inference of the witness. *Id.*

31. Evidence is admissible that a grantor in a deed bore the general reputation in the community in which he lived and about the date of the alleged forgery, of a forger of land titles. *Loring, Guardian, v. Jackson*, 306.

32. As a circumstance tending to show that a paper purporting to be a certified copy of a deed was a forgery, it was proper to admit in evidence certain instruments proven to be genuine which bore the impression of the seal used by the same county clerk about the same time to show by comparison a difference in the impress of the seal, and to allow a witness to testify that he had examined a number of like old certificates of said clerk and that they all bore the impress of the same seal as the genuine instruments. *Id.*

33. To show plaintiff's right to recover as administrator the land sued for in trespass to try title, defendant having plead limitation to the debt, which was secured by vendor's lien reserved by plaintiff's intestate on sale to defendant, it was competent to introduce a note executed by defendant to plaintiff, the administrator, in connection with evidence

Evidence—*Continued.*

that it was given in part for the balance due on the original debt for the land. *Smith, Administrator, v. Owen*, 411.

34. Testimony as to what the grass upon land would be worth to the owner for a certain purpose is not evidence of its market value. *Texas & P. Ry. Co. v. Pemberton*, 291.
35. A witness who testifies to the weights of cattle when sold at the stock yards is presumed, in the absence of evidence to the contrary, to speak from his personal knowledge. *Missouri, K. & T. Ry. Co. v. Kyser & Southerland*, 322.
36. On the issue whether a person was negligent on the occasion in question, evidence that he committed similar acts of negligence on other occasions is inadmissible. *Missouri, K. & T. Ry. Co. v. Parrott*, 325.
37. On the issue of plaintiff's contributory negligence in leaving open a switch in violation of a rule of his employer, which rule it was claimed was ineffective because not enforced, evidence that switches were frequently found open by a witness running on the road nine months before the accident was admissible, the question whether the conditions and rules were the same going to its effect rather than its admissibility. *Id.*
38. Testimony as to what would have been done by a party in hypothetical circumstances, was immaterial where the sole issue concerned what was actually done. *Watkins Ld. Mtg. Co. v. Thetford*, 521.
39. Evidence of experiments made by plaintiffs for the purpose of showing at what point on the track the engineer could have seen the deceased considered, and held admissible. Evidence of this character is admissible when the experiments are made under circumstances substantially similar, in all material particulars, to those obtaining at the time of the occurrence with regard to which the evidence is offered. *Houston & T. C. R. Co. v. Ramsey*, 603.

Execution.

1. It is not essentially necessary to the issuance of an execution that it be provided for in the judgment, and an execution can be issued under a judgment, although not provided for therein. *Taylor v. Doom*, 59.

Execution Sale.

1. A sale under a dormant judgment is only voidable, and can not be attacked in a collateral proceeding. *Taylor v. Doom*, 59.

Executor.

When appeal bond necessary. See *Appeal Bond, 1.*

1. In the absence of authority conferred by the will an independent executor is without authority to partition the estate among the devisees. *Johnson v. Short*, 128.
2. The plaintiff claimed the land in controversy under and by virtue of an attachment lien duly foreclosed upon the interest of the defendant in said land as one of several devisees. Before the will was probated and before the attachment was levied the defendant, by agreement with the executor, the other devisees not being parties thereto or consenting thereto, received from the executor certain personal property at a stipulated valuation, agreeing that the same should be applied on his, defendant's, part of the estate. Held that the agreement between the defendant and the executor was not a valid partition of the lands of the estate, and did not prove that the defendant had no other or further interest in the estate. *Id.*
3. Where the will gave an independent executor no express power to sell land of the estate, and it is not claimed that the sale was made for the purpose of paying debts of the estate, the court did not err in refusing to consider an attempted sale of land by the executor. *Id.*

Exemplary Damages.

For persistent trespasses. See *Damages, 3.*

Exemption.

Of homestead from forced sale. See *Homestead, 1-7.*

Expert.

As to time required to stop train. See *Evidence, 17.*
As to cause of wreck. See *Evidence, 18.*
Conditions producing pain. See *Evidence, 20.*

False Imprisonment.

Liability of sureties. See *Sheriff, 1.*

1. The failure of the officer issuing the warrant of arrest to insert in the complaint the date of the commission of the offense would not render the sheriff who served it liable for false imprisonment. *Roberts v. Brown*, 206.
2. The plaintiff necessarily suffered injury and was entitled at least to nominal damages where the sheriff placed him in jail for forty hours instead of taking him at once before the nearest judicial officer for bail, and it was error for the court to submit the question of injury vel non to the jury. *Id.*
3. If the sheriff was guilty of false imprisonment his bondsmen were liable. *Id.*

False Representations.

Rescission on account of. See *Contract, 20.*
Showing materiality. See *Pleading, 1.*

1. One who buys land in possession of another is charged, as to the rights of such possessor, with notice of his title, but is not precluded thereby, as against the vendor, from maintaining suit for rescission of the contract on the ground that he relied on false representations by the vendor as to his title and right of possession. *Olschewske v. King*, 474.
2. One contracting to buy land in reliance on false representations by the vendor as to his title and right of possession is not precluded from maintaining suit for the rescission of such contract, recovery of money paid, and cancellation of purchase-money notes, by the pendency of a suit against him and his vendor, by third parties, concerning the right to and possession of the land, nor by the fact that he did not set up in that suit his right to rescind. *Id.*
3. A finding that the court was led to render a decree of partition by representations that certain part owners had no interest in the land was sufficient to establish the procurement of such decree by fraud. *Cowan v. Brett*, 569.
4. On the question whether a release of her claim for damages was procured by fraudulent representations made to plaintiff her testimony that no such representations were made or induced her to sign, was not conclusive against her where there was other evidence of their making and effect, and her impaired reason, occasioned by the injuries may have warranted a belief by the jury that she did not recollect what took place. *Gulf, C. & S. F. Ry. Co. v. Johnson*, 237.
5. A settlement, though induced by false representations by defendant's physician as to the extent of plaintiff's injuries is not to be set aside therefor unless the claim agent acting for defendant in the matter knew and availed himself of such representations by another or acted in conspiracy with him. *Id.*
6. Statements by a claim agent that settlement must be made now or the defendant would not thereafter take it up, and better terms could be had now than in the future must be shown to have been false to constitute ground for avoiding the contract. *Id.*
7. Where it was sought to rescind a sale of ranch property because of misrepresentation of the number of cattle thereon, the contract containing an estimate but providing for ascertaining the exact number by tally, if fraudulent misrepresentation of the number by the seller was to be submitted as a ground for rescission defendant was entitled to a charge to find in his favor if the representations, though not correct, were fairly and honestly made. *Blair v. Baird*, 134.

False Representations—*Continued.*

8. A party who has overreached another by fraudulent representations can not avoid rescission of the contract by showing that his adversary attempted to do even so to him. *Id.*

Fees.

For collecting Indian depredation claims. See *Indian Depredations, 1.*

Fellow Servants.

Act of 1897 construed. See *Master and Servant, 12.*
Injury by negligence of. See *Master and Servant, 14, 15.*

Fences.

Where stock law is in force. See *Railways, 1, 5.*
Defects in. See *Railways, 2–4.*
Absence of. See *Railways, 6.*

Field Notes.

Return of. See *Survey, 1.*

Fire.

Loss of goods by. See *Carriers of Freight, 14.*
Preventing escape of. See *Railways, 7.*

Fisheries.

Constitutionality of law regulating. See *Constitutional Law, 3.*

1. The title to fish, oysters, terrapin, shrimp, etc., in the public waters of the State is, and always has been, vested in the State, and the State may therefore impose such conditions and burdens as it sees fit upon the appropriation of said property to private uses. *Raymond v. Kibbe,* 209.

Foreclosure.

1. Where the owner of cattle, pending a suit for foreclosure of a lien upon them for pasturage, took possession and sold and removed them, giving bond to answer for any judgment on the lien foreclosure, on recovery of such judgment it was proper to render judgment also against him and his sureties on the bond for the amount so recovered, in favor of the assignees of the pasturage claim and lien, though he also recovered judgment against the assignor for damages for shortage in sale of the cattle to him by such assignor, who had continued to pasture them after the sale. *Gage v. Hunter,* 241.
2. The claim of the purchaser of cattle against the seller, for damages by reason of shortage in the number sold, was not incident to or connected with that of the seller for their subsequent pasturage for the vendee, and could not be offset against a suit against him by the assignees of the claim and lien for pasturage. *Id.*

Forfeiture.

Waiver of. See *Landlord and Tenant, 3.*

Forgery.

Reputation of maker of deed. See *Evidence, 31.*
Comparing impressions of seals. See *Evidence, 32.*
Claimant under forged deed. See *Innocent Purchaser, 1.*

1. A finding of fact may be supported by a combination of slight circumstances, no one of which taken alone would be sufficient. Evidence as to forgery considered and held sufficient. *Loring, Guardian, v. Jackson,* 307.

Fraud.

Contract in writing. See *Evidence, 1, 2.*
In procuring decree of partition. See *False Representations, 3.*

Fraud—*Continued.*

In rendering judgment by agreement. See *Judgment, 4.*
Showing materiality. See *Pleading, 1.*

Fundamental Error.

Reversal for. See *Practice on Appeal, 1.*

Garnishment.

1. The validity of a writ of garnishment depends upon pursuing the steps prescribed by law. A garnishee can not accept service, or voluntarily answer, or waive defects so as to affect the right of the defendant in the original suit. A writ of garnishment, in which the date on which the garnishee was required to appear and answer, was left blank, was void, and conferred no jurisdiction on the court over the property of the defendant in the hands of the garnishee. *Gilbert Book Co. v. Pye,* 183.
2. A defendant debtor who has obtained possession of the garnished fund by giving a replevy bond is not estopped thereby from moving to quash the writ of garnishment. The statute expressly authorizes him to make any defense that the garnishee could make. *Fleming & Fleming v. Pye,* 176.
3. Sayles' Revised Statutes, art. 225, construed. Jones v. Bull, 90 Texas, 194, distinguished. *Id.*
4. In an equitable proceeding to set aside, after the adjournment of the term, a judgment obtained against plaintiff as garnishee, which recited that it was had upon "the evidence and from the answer," though such answer did not justify the judgment and plaintiff shows that he had a good defense to the proceeding, he must show also that he was prevented from making it without fault or negligence on his part; where he shows no attention given to the matter after filing answer, nor excuse therefor except that his attorney was sick, nor reason for not resorting to motion for new trial or appeal except his inexcusable ignorance that judgment had been rendered against him, his petition is subject to demurrer. *Trammell v. Ullman, Lewis & Co.,* 470.
5. Plaintiff brought suit in the District Court against a nonresident defendant for the sum of $7.75 alleged to be due on contract, and for $2,000 damages for breach for said contract; no service was had on defendant; a writ of garnishment was sued out, the application and affidavit averring that the defendant was indebted to plaintiff in the sum of $7.75 and a bond was executed in the sum of $15.50. The garnishee moved to abate the suit for want of jurisdiction in the District Court, and answered admitting an indebtedness to defendant in the sum of $561.90. Held, the motion to abate was properly sustained. *Meek v. Houston I. & B. Co., Garnishee,* 563.

Gift.

By parent to child. See *Advancement, 1-3.*
Whether testamentary. See *Parol Gift, 1.*

Guaranty.

1. Plaintiffs addressed the following letter to one of the defendants: "We have an order amounting to $142.50 from C. S. Haggarty, of Beaumont, Texas, whom, we understand, you are backing. As Mr. Haggarty is a new man in the business, and seems to have no financial standing at present, will you kindly guarantee the payment of this bill? Kindly let us hear from you." Upon receipt of said letter the addressee wrote upon the same the following: "O. K., George Adams, Sr.," and returned it to the plaintiffs; thereupon the goods were shipped to H. Held, that by said endorsement Adams became originally and unconditionally responsible for the payment of the debt, and was not entitled to notice of default on the part of H., nor of acceptance on the guaranty, nor was any diligence necessary on the part of plaintiffs to fix his liability. *Tilt-Kenney Shoe Co. v. Haggarty,* 335.

Harmless Error.

Evidence not affecting judgment. See *Carriers of Passengers*, 7.
Materiality of testimony. See *Evidence*, 7.
Proof by other testimony. See *Evidence*, 20, 29.
Reminding jurors of their oath. See *Instructions to Juries*, 20.

1. In a trial before the court, the erroneous admission of evidence is harmless error where there was other and unobjectionable evidence to prove the same facts sufficient to support the judgment. *Gage v. Hunter*, 241.
2. An appellant can not complain of statements made by the court during the trial, as to the state of the proof as affecting the subsequent order of proceeding, which, if warranted, could have prejudiced only the appellee. *Roche v. Dale*, 288.

Heirs.

Adoption of minor. See *Wills*, 2.
Brothers and sisters of half blood. See *Wills*, 4.

1. The administration of an estate having been closed, leaving debts unpaid, the heirs could maintain suit to recover a tract of land turned over by the administrator, as being included in the sale, to a purchaser of property from him, but which was in fact never included in the property inventoried nor embraced in the sale. *Fowler v. Agnew*, 540.

Highway.

Designation upon plat. See *Dedication*, 1.
Consent to opening. See *Public Road*, 1.

Homestead.

Sale in administration proceedings. See *Estoppel*, 3.
Review of order setting aside. See *Judgment*, 5.
Suit by wife for possession of. See *Jurisdiction of District Court*, 1.
Wife not necessary party. See *Parties*, 1, 2.

1. Appellant lived with his family upon a two-acre lot in the town of B., this State, and had resided there for many years. He was engaged in a land agency business in B. and was also a traveling salesman. He owned a tract of 20 acres of land outside of the limits of the town, which was occupied by tenants who used it for purposes of agriculture and horticulture, paying appellant part of the crop grown on it, which he used at home and sold on the market; neither he nor any member of his family ever lived on the land nor used or occupied it as a home. Held, said 20-acre tract was no part of appellant's homestead, and was therefore subject to execution. *Parker v. Moody & Co.*, 492.
2. One's homestead must be either rural or urban, it can not be partly of one and partly of the other. *Id.*
3. If a vacant detached lot in a town or city is principally used by the head of a family as a horse lot, cow lot or garden in connection with the home, it partakes of the exemption attaching to the residence; but the use upon which the exemption is predicated must be the principal use, and not a mere incidental or casual use. The fact that the agricultural products from the lot were sold and the money used to support the family will not make the lot a part of the homestead. Where the evidence showed that the husband was a saloonkeeper; that the cultivation of the lot in question was not his business; that the lot was rented to tenants on shares or cultivated mainly in staple crops like corn and cotton by his procurement, or was used occasionally for the pasture of his horses, cows and calves, it was manifest that the use of the lot in connection with the home was only casual, and such lot was therefore not exempt as a part of the homestead. *Levy & Co. v. Lacour*, 191.
4. Where a husband during the marriage purchased the homestead, paid part cash, and executed his notes for the balance of the purchase money, the fact that some of said notes were transferred to the wife and became her separate property, would not make the homestead her sepa-

Homestead—*Continued.*

rate property, nor affect its character as community property. *Cox v. Oliver*, 110.

5. Upon the death of a wife, leaving children, the surviving husband is entitled to the exclusive possession of the community homestead so long as he chooses to occupy the same. Upon his death his second wife is entitled to possession of the same, subject to the right of the children by the first wife to jointly occupy the same with her, or to partition the same. If partitioned, the husband's half of such homestead should be awarded to such second wife for her exclusive use so long as she may elect to occupy it as a homestead. A guardian of the minor children of the first wife, if authorized by the Probate Court, would have the right to occupy the undivided homestead jointly with the second wife. This right, however, would not extend to any member of the guardian's family. *Id.*
6. One who had been divorced from his wife may mortgage the homestead. *Blake v. Lowry*, 17.
7. A parol partition of community land by the husband, fairly made, with the consent or acquiescence of the wife, will be binding on the wife notwithstanding its homestead character. For the purpose of effecting a partition of community land occupied as a homestead the husband executed a deed to the cotenant; the name of the wife did not appear in the body of the deed, but she signed and acknowledged it. Held that, although the deed was not operative as a conveyance by the wife, it was evidence of her consent to the partition. *Brown v. Humphrey*, 23.

Husband and Wife.

Title acquired by limitation. See *Community Property, 1.*
Improvements with community funds. See *Community Property, 2.*
Descent and distribution. See *Community Property, 3.*
Presumption from separation and remarriage. See *Divorce, 1.*
Proof insufficient to show abandonment. See *Divorce, 2.*
Separate or community property. See *Homestead, 4.*
Rights of second wife. See *Homestead, 5.*
Rights of husband after divorce. See *Homestead, 6.*
Consent of wife to partition. See *Homestead, 7.*
Actions involving homestead rights. See *Parties, 1, 2.*
Joint power of attorney. See *Powers, 1.*

Impeachment of Witness.

Showing materiality of testimony. See *Evidence, 7.*
Reputation as forger. See *Evidence, 31.*

Independent Executor.

Bond on appeal. See *Appeal Bond, 1.*
Partition of estate by. See *Executor, 1, 2.*
Power to sell land. See *Executor, 3.*

Indian Depredations.

1. The owner of a claim for Indian depredations can not lawfully contract to pay an amount in excess of fifteen percent thereof for expenses and fees in collecting the same. *Friend, Administrator, v. Boren*, 34.

Indorsement.

Of certificate of stock in blank. See *Pledge, 1.*

Infancy.

Citation by publication. See *Minors, 1.*
Contract for necessaries. See *Minors, 2.*

Injunction.

Jurisdiction over entire controversy. See *Jurisdiction, 1, 2.*
Against management of party. See *Political Party, 1.*

1. The fact that the road overseer had authority to remove obstructions from a public road unlawfully fenced up by defendant did not prevent the county from maintaining its action against him for an injunction against the continuing of such nuisance, and the county had the right to institute and prosecute such action. *Franklin County v. Huff*, 355.

Innocent Purchaser.

Burden of proving notice. See *Equity, 1.*

1. One claiming under a forged deed can not be an innocent purchaser. *Loring, Guardian, v. Jackson*, 307.

Instructions to Juries.

Correcting unwarranted argument. See *Argument of Counsel, 1.*
Charge not warranted by evidence. See *Assault and Battery, 3.*
Charge on weight of evidence. See *Carriers of Freight, 11.*
Charge held affirmative error. See *Contract, 15.*
Damages incapable of exact measurement. See *Damages, 1.*
Loss of society of deceased. See *Damages, 2.*
Error corrected by requested instruction. See *Damages, 11.*
Peremptory charge unwarranted. See *Master and Servant, 2, 13.*
Construction of written rule. See *Master and Servant, 6.*
On duty of brakeman to inspect. See *Master and Servant, 7.*
Manner of stopping cars. See *Master and Servant, 10.*
Limiting recovery to facts alleged. See *Negligence, 18.*
Assignment of error in. See *Practice on Appeal, 9.*
Definition of proximate cause. See *Proximate Cause, 3.*
Assuming uncontroverted facts. See *Railways, 15.*
Requesting peremptory charge. See *Statute of Frauds, 2.*
Submitting matters not in issue. See *Telegraph, 2.*
Verdict not responsive to charge. See *Verdict, 1, 3.*
Construing written instrument. See *Written Instrument, 1.*
Error of mere omission. See *Written Instrument, 3.*

1. The charge of the court should be considered and construed as a whole. *Southern Kan. Ry. Co. v. Sage*, 38.
2. A requested charge must not assume facts which are to be determined by the jury. *Smith, Administrator, v. Owens*, 412.
3. A mere statement in the charge of the issues made by the pleadings can not be construed as assuming the existence of proof on those issues. *Missouri, K. & T. Ry. Co. v. Kyser & Southerland*, 322.
4. A charge which assumes the fact that the goods sued for had a market value is harmless when it is certain that said goods had at least some value in the market. *Stewart v. Sachs & Co.*, 530.
5. Instructions should not treat as doubtful facts which are unquestioned, but may assume that they exist. *Commercial Tel. Co. v. Davis*, 547.
6. A charge is not upon the weight of evidence which leaves the jury to determine the facts, but instructs them as to the legal conclusions to be drawn therefrom. *Roche v. Dale*, 287.
7. A charge with respect to defendant's liability to account for the proceeds of mortgaged "cotton" received by him authorized the jury to consider the liability for the seed as well as for the lint. *Id.*
8. Where witnesses differed in their testimony as to the location of a boundary line it was error for the court to instruct a verdict for the plaintiff for the land described in his petition. *Logan v. Meads*, 477.
9. An issue of negligence should never be withdrawn from the jury, except when there is no material conflict in the evidence and when different inferences can not be drawn from it. *Texarkana & Ft. S. Ry. Co. v. Frugia*, 48.
10. In a suit for damages for failure to repair a well as per contract, charge of the court considered, and held erroneous because submitting an issue not raised by the evidence. *Pilot Point Water Works v. Fisher*, 28.
11. A charge that the burden was on the plaintiffs to establish by a prepon-

Instructions to Juries—*Continued.*

derance of the evidence an issue alleged by them, did not unduly emphasize such issue. *Ferguson v. Morrison*, 396.

12. A charge which, in directing a verdict on the finding of certain enumerated facts, ignores a theory of the case supported by pleading and evidence requiring a contrary finding, presents error which necessitates reversal. *Pinkston v. Boyd*, 568.
13. A requested charge which ignores an issue supported by evidence and on which a different verdict from that which it calls for might be rendered, should be refused. *Watkins Ld. Mtg. Co. v. Thetford*, 536.
14. It is the duty of the court to submit an issue raised by the evidence, although the evidence would not warrant a verdict thereon in favor of the party at whose instance it is submitted. *Waggoner v. Wyatt*, 76.
15. A mere omission to charge fully on an issue is not error without a requested charge supplying the omission. *Missouri, K. & T. Ry. Co. v. Parrott*, 325.
16. Failure to instruct on a point is ground for reversal where request was made for a charge covering that question only, not where other propositions, some of them not correct, were embraced in the requested instruction. *Cowan v. Brett*, 570.
17. Defendant can not complain of a charge to find in his favor upon the hypothesis which it stated, though such charge would have been justified on one more favorable to him. *Gulf, C. & S. F. Ry. Co. v. Dyer*, 94.
18. That a failure of the court to define terms used in its charge will not require a reversal of the judgment is not a rule of invariable application. It is the duty of the court to so frame its charge as to distinctly separate the questions of law from the questions of fact, and to instruct the jury as to the law arising on the facts, and where a failure to do this has probably misled the jury the judgment will be reversed. *Davis v. Hardwick*, 71.
19. Plaintiff sued to recover fifty shares of stock which had been pledged to secure certain joint debts of himself and H., deceased. H. paid said debts, received said shares of stock, had them cancelled and new certificates issued in his own name. Plaintiff testified that H. acquired said stock upon the understanding that he was to hold it only as security or pledge for plaintiff's indebtedness. The defendants claimed (1) that H. had bought the stock from plaintiff; or (2) if H. had in fact converted the stock, plaintiff's suit was barred by limitation. The court charged the jury that if they believe from the evidence that there was a conversion of said stock by H. more than two years before suit filed, to find for defendants; and if they believed from the evidence that plaintiff never parted with his title to said stock and is still the owner of the same to find for plaintiff. Held, under the facts of this case the court should have explained to the jury what would amount to a conversion, and what would amount to a parting by plaintiff with his title to the stock. *Id.*
20. Conditions may arise which make it the duty of the court to remind the jury in its charge of the obligations of their oath as to the law and the evidence they should be governed by. In any event, such charge is harmless. *International Harvester Co. of A. v. Campbell*, 422.
21. When evidence is admitted without objection, the question of variance can not be raised upon an instruction to the jury. *Id.*
22. The use of the word "approximately" for proximately in one place in the charge was harmless when everywhere else in the charge proximate and not approximate was used in referring to the cause of the injury. *Choctaw, O. & T. Ry. Co. v. McLaughlin*, 524.
23. In a civil suit it is proper to instruct the jury to decide the issues submitted to them by a preponderance of the evidence. *Texas & P. Ry. Co. v. Whitcley*, 346.
24. See charge held to permit plaintiff to recover only fair compensation for the injuries received, and not subject to the objection that it permits plaintiff to recover double damages. *International & G. N. R. Co. v. Wray*, 380.
25. A charge is defective, not necessarily because it suggests to the jury the

Instructions to Juries—*Continued.*

various subjects or elements of damages they may consider, but where it mentions the subjects in such a way and in such a connection as is calculated to lead them to treat items that enter into the same subject as separate and distinct elements of damage. *Texas & N. O. Ry. Co. v. McCraw*, 247.

Intention.

Absolute conveyance or mortgage. See *Conditional Sale*, 4.

Interest.

As part of damages. See *Jurisdiction of District Court*, 5.

Interstate Commerce.

1. If it be conceded that a railway, in transporting its own construction materials, is engaged in commerce, a shipment of steel rails, for defendant, to the point in Arkansas, on defendant's railway, to which it was consigned had completed its interstate transit when received there, and ceased to be an interstate shipment from that time. Gulf, C. & S. F. Ry. Co. v. State, 97 Texas, 274, followed. *Coley v. Kansas City So. Ry. Co.*, 488.
2. The United States statute requiring interstate carriers to equip their cars with automatic couplers has no application to the case of an employe injured while engaged in coupling, for further and intrastate transportation over his employer's road, and use thereon, a car of construction materials shipped to it from another State and which had been received at the point of destination of such interstate shipment. *Id.*

Intoxication.

As bearing upon contributory negligence. See *Negligence*, 11, 12.

Joint Owners.

1. In trespass to try title, one or more of several joint owners may recover the entire tract against a stranger to the title. *Logan v. Meads*, 477.

Judge.

Election of special judge. See *Special Judge*, 1.

1. The fact that the regular district judge and a special district judge, duly authorized to act in the particular case, were holding their respective courts at the same time and in the same courthouse, does not of itself render the proceedings before the special judge void, and a judgment rendered by the special judge under such circumstances will be reversed only when it is made to appear that the appellant was, by reason of such facts, deprived of some valuable right, as, for instance, the right of trial by the regular jury, and not then unless the complaining party had a meritorious cause of action or defense. *Bedford & Bates v. Stone*, 200.

Judgments.

Correction of mistake in equity. See *Eminent Domain*, 1.
Providing for issuance of process. See *Execution*, 1.
Decree procured by fraud. See *False Representations*, 3.
On forthcoming bond. See *Foreclosure*, 1.
Permitted by defendant's neglect. See *Garnishment*, 4.
Possession of defendant after judgment. See *Limitation*, 18.
Unauthorized by agreement. See *Limitation*, 19.
New trials in Justice Court. See *Practice in Trial Court*, 6.
Irregularity in proceedings of commissioners. See *Public Road*, 1.
Fixing value of use of property. See *Trial of Right of Property*, 1.

1. Where the sureties on an attachment bond were parties defendant to a

Judgments—*Continued.*

suit, but the judgment makes no disposition of them the judgment is not final and an appeal therefrom will be dismissed. *Holly v. Duke*, 529.

2. There can be no question as to the power of a trial court in this State to correct its judgment as to an error in the calculation of the amount thereof at any time prior to action by the Appellate Court upon the judgment. *Blain v. Park Bank & Trust Co.*, 359.
3. Under the provisions of the statute, a mistake or miscalculation in a judgment can be corrected at any time on application of either party after notice to the opposite party. *Taylor v. Doom*, 59.
4. A judgment rendered by agreement of counsel authorized thereto can not be set aside as fraudulent because different in its terms from what the party attacking it understood it to be. Nor will the case be remanded to permit it to be attacked for mistake where such plea was not interposed at the trial, especially when such plea would now be barred by limitation. *Hamilton v. Blackburn*, 153.
5. From an order of the County Court setting aside a homestead to the surviving widow the administrator of the estate appealed to the District Court where the same order was made. Afterwards, in his capacity as guardian of the minors, he sued out a writ of certiorari for the purpose of having the same order reviewed by the District Court. Held, there is no authority for such second review of a probate proceeding. The proceeding to set aside the homestead was a proceeding in rem and the judgment of the District Court on appeal was conclusive upon all persons interested in the estate. *Pearce, Guardian, v. Leatch*, 398.
6. A party seeking to reopen a case at a subsequent term must show that he was prevented from making a valid defense by fraud, accident, or the act of the opposing party, unmixed with fault or negligence on his part. Public policy demands that, in the absence of fraud on the part of his counsel, the party should be as fully concluded by the act of his attorney as if he were acting for himself, and the same doctrine applies to negligence or mistake of counsel. *Gilbert v. Cooper*, 328.
7. The Probate Court is one of general jurisdiction in matters pertaining to estates, and its orders and decrees must, upon collateral attack, be presumed valid, unless the orders themselves or the record of the proceedings affirmatively show want of authority in the court to make them. *Murphy v. Sisters of I. W. of S. A.*, 638.
8. While on a collateral attack the presumption will be indulged that an affidavit was filed to authorize the issuance of the citation by publication, still this presumption may be rebutted, unless by doing so the record is in some way contradicted; therefore where the record shows affirmatively an insufficient affidavit the said presumption is overcome. *Stoneman v. Bilby*, 293.
9. Although the judgment under which land is sold be dormant, the sale is not void and can not be collaterally attacked. *Parker v. Moody & Co.*, 492.
10. This suit, although between the same parties as the one in which the judgment was rendered under which the land was sold, is a collateral attack on such judgment, it being in a different court from that wherein the judgment was rendered. *Id.*
11. In a suit of trespass to try title the defendants claimed the land under and by virtue of a judgment in personam and by default against the ancestor of the plaintiffs, and an execution sale thereunder. The defendant in that suit was a nonresident and was served by publication. The judgment recited that "the defendant, though citation by publication has been duly and legally made upon him, failed to appear and answer in this behalf, but wholly made default." Held, the court properly permitted the plaintiffs for the purpose of showing the nullity of said judgment to introduce in evidence the petition in that case, wherein it was alleged that the defendant was a nonresident of this State and a resident of Louisiana; also the citation in which the sheriff was commanded to summon the defendant, who resided beyond

Judgments—*Continued.*

the State, by publication; and the sheriff's return which showed citation by publication. *Lutcher v. Allen*, 102.

12. When the judgment sets out the particular kind of citation made on a defendant, the record may be consulted to support or destroy the recital in the judgment. *Id.*
13. By the record, or judgment roll, which may be consulted in an attack upon a judgment, is meant, at least, the process filed in the suit, the judgment itself, and the pleadings of the parties. *Id.*
14. Some years before the filing of this suit certain other of the heirs of the common ancestor brought suit for the same land, and judgment was rendered against them. Held, because the parties to this suit were neither parties nor privies to that suit, the judgment therein rendered was in no way binding on them. *Id.*
15. If a judgment is void at the time of its rendition no lapse of time, however great, would render it valid and binding. *Id.*
16. Opinion reiterated. If the contention was correct that in a collateral attack on a personal judgment against a nonresident, only the recitals in the judgment could be looked to in ascertaining the residence of the defendant, then in but few cases could it be shown that the court had no jurisdiction and the judgment was a nullity, and this, although the averments of the petition, the recitals in the process, the officer's return, and other parts of the record showed that the defendant was a nonresident, and negatived the possibility of any but constructive service. *Id.*
17. When a case is reversed and remanded by a Court of Civil Appeals, and a party obtains a writ of error on the representation that the opinion of the Court of Civil Appeals settled the case, and the Supreme Court affirms the judgment of the Court of Civil Appeals, the case can not be opened again in the trial court for the purpose of hearing any testimony that might change the state of the case on the former appeal. *Olschewske v. Summerville*, 361.

Jurisdiction.

Writ with appearance day left blank. See *Garnishment, 1.*

1. When a court of equity has obtained jurisdiction of a cause by reason of injunction it will retain jurisdiction for the purpose of inquiring into and adjudicating all the points of the controversy; and this rule prevails regardless of the fact that the amount involved could not originally have been sued for in the court granting the injunction. *Houston Rice M. Co. v. Hankamer*, 576.
2. Where appellant was sued, with others, in the Justice Court by twenty-seven different parties in as many different suits; and where the questions of law and fact were practically the same in all said suits; and where all of said Justice Court plaintiffs claimed a lien upon the same property in appellant's possession; and where the judgments obtained in said suits were void for the want of jurisdiction in the Justice Court, the District Court having obtained jurisdiction of said causes by enjoining the further prosecution of said suits and the collection of said judgments, should have retained jurisdiction for the trial of said causes upon the merits and the adjustment of the equities of the parties. The fact that the suits could not be consolidated under the statute was immaterial; having been consolidated by the injunction they should have been tried in that condition. *Id.*
3. No personal judgment can be rendered against a nonresident (a railway company created and operating in another State) upon service on it by notice delivered beyond this State, under article 1230 of the Revised Statutes. *Louisville & N. R. Co. v. Emerson*, 281.

Jurisdiction of County Court.

Amount in controversy. See *Jurisdiction of District Court, 3.*

Restored by legislative act. See *Jurisdiction of District Court, 4.*

1. Plaintiff sued for the value of jennets killed by the engine and cars of defendant. The value was alleged to be $1,000. The suit was for

Jurisdiction of County Court—*Continued.*

this amount with interest from date of loss. Held, the County Court had jurisdiction. *St. Louis S. W. Ry. Co. v. Earl*, 127.

2. If the suit had been one for damages caused by negligence proximately resulting in the injury complained of, where interest could be properly allowed as damages merely, the County Court would not have had jurisdiction. But having been brought under art. 4528, Rev. Stats., the recovery would be limited to the value of the stock killed, without interest until after judgment, and the prayer for interest should be treated as surplusage. *Id.*

Jurisdiction of District Court.

Amount in controversy. See *Garnishment, 5.*

1. The District Court has jurisdiction of a suit by a surviving wife to recover possession of the homestead and other property of the deceased in which she has an interest, and of which she claims she was unlawfully dispossessed. *Cox v. Oliver*, 110.
2. The District Court has jurisdiction to try a case of trespass to try title for land situated in another county, and it is error to dismiss such case on demurrer questioning the jurisdiction. The question was one of venue only and to be raised by plea of privilege. *Wolfe v. Willingham*, 167.
3. A suit was brought in the District Court upon an unliquidated demand for $1,500; afterwards by amended petition the claim was reduced to $500. Held, the District Court had no jurisdiction to try the case after the amendment was filed. *Waller v. Gray*, 405.
4. By an Act of the Legislature, which took effect July 14, 1905, the general jurisdiction of a County Court in civil and criminal matters was restored; in a suit for damages then pending in the District Court of the same county an amended petition was filed on August 7, 1905, reducing the claim for $1,500 to $500. Held, upon the filing of the amended petition the District Court should have transferred the case to the County Court. *Id.*
5. In a suit for $500 damages and interest thereon, the interest being claimed as part of the damages to which plaintiff is entitled in addition to the amount named as damages, the District Court would have jurisdiction. *Id.*

Jury.

1. While it is true that under our laws a party litigant is entitled to a trial by jury in all cases of equitable as well as legal cognizance, still this right will be considered as waived unless seasonably exercised. *San Jacinto Oil Co. v. Culberson*, 401.
2. The fact that one of the jury was kin to appellee's attorney and the latter interested in the controversy by a contingent fee, was not ground for new trial unless such contingent interest was shown to be unknown both to the appellant and her attorney when they accepted such juror with knowledge of his kinship to the attorney. *Cowan v. Brett*, 570.
3. The fact that a juror is prejudiced against a person who is to be an important witness for defendant is not a statutory ground of challenge for cause; but a challenge for this cause might properly be sustained in the discretion of the court, under art. 3298, of the Revised Statutes, making that a challenge for cause "which, in the opinion of the court, renders the juror an unfit person to sit on the jury." *Southern Kan. Ry. Co. v. Sage*, 38.
4. Questions asked by the jury as to the effect of a judgment for less than the amount sued for upon the costs of the case, held not to show misconduct or improper motive. *Gulf, C. & S. F. Ry. Co. v. Dyer*, 94.

Knowledge.

Of fraud by another agent. See *False Representations, 5.*

Land Agent.

1. The failure of a land agent to pay his occupation tax will not defeat his action to recover commissions for making a sale; the law prohibiting pursuit of the occupation without such payment is a revenue law, and not a regulation of the business on grounds of public policy. *Watkins Ld. Mtg. Co. v. Thetford*, 536.
2. An agent who has procured a purchaser for land whom the owner accepted and contracted with, will not be defeated of his right to commissions by the fact that the purchaser proved unable to carry out such contract. *Id.*
3. Where the owner of land committed the sale solely to an agency selected by him, another, who found a purchaser in pursuance of an agreement with such agency for a division of the commissions, and took no other part in closing the transaction, was not entitled to recover any commission from the owner. *Id.*

Landlord and Tenant.

1. A contract in writing executed by a lessee of land stating that he "has contracted and sold" to a third party the leased land, is in effect an assignment of the lease, and, there being in the lease a covenant against subletting, was in violation of said covenant as well as the statute against subletting, and was therefore inoperative as against the lessor. *Waggoner v. Wyatt*, 75.
2. The fact that one holding under an invalid assignment of a lease of land offered to lease or purchase said land from the owner at a price probably in excess of its real value, does not exempt such person from liability in damages for preventing the owner from using his land as his ownership entitled him to. *Id.*
3. Where a written rental contract contained a provision for reentry by the landlord in case of default in payment of rent when due, a demand for the rent after default was a waiver of the forfeiture. *Gammon v. Sigel & Cohen*, 199.
4. A landlord who merely takes up and holds the debt and security given to another by his tenant for a mule purchased by the latter, can not be held to have thereby furnished the mule to him and to have acquired a landlord's lien therefor. *Roche v. Dale*, 287.
5. A landlord who converts mortgaged crops of his tenant is not relieved from liability to the mortgagee by applying the proceeds to the payment of a debt owing by the tenant to him and secured by a mortgage on other property of the tenant, but not by lien on the crop so converted. *Id.*

Lease.

Consideration for. See *Contract*, 6–8.
Assignment of. See *Landlord and Tenant*, 1, 2.
Waiver of forfeiture. See *Landlord and Tenant*, 3.

Lien.

Covenant for removal of. See *Estoppel*, 1, 2.
Of landlord for team furnished. See *Landlord and Tenant*, 4.

Limitation.

Title acquired by. See *Community Property*, 1.
New trial where action is barred. See *Judgment*, 4.
New cause of action. See *Pleading*, 3.
Title by. See *Specific Performance*, 1.

1. Our statute sufficiently defines the character of the adverse possession necessary to support the ten years' statute of limitation, and it was error, under the facts of this case, for the court in its charge to undertake to amplify the terms which the Legislature has carefully defined. *Logan v. Meads*, 477.
2. It was error for the court, under the testimony in this case, to charge the jury in effect that if the defendant, at the time he went into possession of the land in controversy, had no intention of claiming the

Limitation—*Continued.*

same by limitation, and that he had no such intention until a later date—less than ten years before suit filed—and that prior to said date, although holding the land, he was not doing so in repudiation of the right of the owner, then there would be no adverse possession within the meaning of the law; because, if the defendant claimed the land in controversy for the statutory period adversely, within the meaning of the statute, it was entirely immaterial that he made no claim thereto by "limitation," "at the time he went into possession," or at any other time. *Id.*

3. The enclosure of a tract of land partly by fence and partly by impassible water barriers or courses is sufficient to support the statute of limitation if the natural barriers are so used in connection with the fences as to indicate that they are relied upon to enclose the land. Facts considered and distinguished from the facts in Polk v. Beaumont Pasture Co., 64 S. W. Rep., 61, and Vineyard v. Brundrett, 42 S. W. Rep., 232. *Loring, Guardian, v. Jackson*, 307.
4. The actual possession of a small part of a large tract of land without claim of right to the entire tract will not support the plea of ten years' limitation as to the entire tract. *Webb v. Lyerla*, 124.
5. An inventory of property rendered for taxation during the period of limitation not containing the land claimed is admissible in evidence as a circumstance tending to show that the party pleading the statute did not claim the land at that time. *Id.*
6. Although a rendition of property for taxation is in the handwriting of the tax assessor and not of the party rendering the property, still when it comes from the custody of such assessor the presumption of regularity of official conduct makes it competent evidence. *Id.*
7. Evidence of occupancy considered and held too indefinite to establish title by limitation. *Taylor v. Doom*, 59.
8. One who takes and holds possession of land without any right or title thereto, and with the intention and for the purpose of acquiring title by limitation, is within the protection of the ten years' statute of limitation. *Link v. Bland*, 519.
9. Facts discussed and held insufficient to show title by limitation under the ten years' statute. *Fischer v. Giddings*, 393.
10. The payment of taxes for any length of time would not, by itself, be sufficient to show such possession as to support a plea of limitation, nor even to raise a presumption of such possession. *Lutcher v. Allen*, 102.
11. In a controversy over land conveyed to the deceased husband and sought to be recovered by the legal from the putative wife, the latter, asserting a parol gift and limitation, could not avail herself of possession for five years under the registered deed to the husband, since the legal wife claimed under the same deed. Thompson v. Weisman, 98 Texas, 170, distinguished. *Hammond v. Hammond*, 285.
12. The object of the statute, in making the registry of the deed necessary to the bar of five years' limitation is to give notice to the owner that the person in possession is claiming under the deed, and if there is such uncertainty of description that it will not answer the purpose intended, it can not be considered a deed duly registered under the statute. The deed, as it is found on the record, should of itself furnish notice of the particular land claimed, without resorting to extrinsic evidence. *Young v. Trahan*, 611.
13. A deed which described the land conveyed as follows: "Said 14 acres of land is to be 2 acres in front and runs back north 7 acres and known as the Edward's place," is too defective in description to support the five years' statute of limitation. *Id.*
14. Facts considered, and held not sufficient to support ten years' limitation. *Id.*
15. Against the right to correct a mistake in the description of land in a deed limitation will begin to run from the time the mistake was actually discovered, or from such time as by the exercise of reasonable care and diligence it might have been discovered. This is ordinarily a question of fact for the jury. *Wright v. Isaacks*, 223.

Limitation—*Continued.*

16. The failure on the part of a vendee of land to have the same surveyed and thus determine whether or not the boundaries pointed out by his vendor are correct, is not necessarily negligence, and in the absence of negligence limitation will not begin to run until the fraud is actually discovered. *Waller v. Gray*, 406.
17. In the case of Bass v. James, 83 Texas, 110, the trial court held as a matter of fact upon the evidence before it, that the purchaser of the land in that case, by the exercise of reasonable diligence, could have sooner discovered the falsity of the representations relied on. In the case at bar the question is as to the sufficiency of plaintiff's pleading, and there is nothing on the face of the pleading which requires a holding that plaintiff was guilty of negligence in not having the land surveyed. *Id.*
18. Limitation can not prevail against a judgment recovering title to land from one who continued thereafter to remain in possession, unless continued for the statutory term (five or ten years) after rendition of the judgment, since that rendered possession prior to the recovery of no effect. *Hamilton v. Blackburn*, 153.
19. An action to set aside for fraud a judgment for recovery of land entered by agreement of counsel which judgment it was claimed was different from that authorized by the complaining parties, was barred by limitation in four years where the complainants, though ignorant of the nature of the judgment rendered, had taken no steps to inform themselves thereof and were not misled by any misrepresentation of it. *Id.*

Lis Pendens.

As affecting right to rescind. See *False Representations, 2.*

Location.

Return of field notes. See *Survey, 1.*

Married Woman.

1. A married woman may make verbal partition of her real estate, and her deed, though not acknowledged, may be effective therefor. *Cowan v. Brett*, 570.

Master and Servant.

Duties of train porter. See *Carriers of Passengers, 10.*
Enforcement of rule. See *Evidence, 87.*
Lookout for passing train. See *Negligence, 3.*
Observing prescribed code of signals. See *Negligence, 17.*
Employes with defective sight or hearing. See *Negligence, 19.*
Stopping train suddenly. See *Negligence, 22.*

1. Evidence considered, and held to warrant a verdict against a railroad company for personal injuries where the railroad company had let the contract for the construction of the road to a construction company, and the construction company had sublet the contract for laying the rails to a third party by whom plaintiff was employed when injured. *Choctaw, O. & T. Ry. Co. v. McLaughlin*, 524.
2. In a suit for personal injuries where there was evidence tending to show that the tool by which plaintiff was injured was not a safe tool or apparatus to use for the purpose for which it was provided by the master, that it was insecure and dangerous for that purpose, that complaint of these facts had been made to the representative of the master without effect, that the accident was caused by the improper construction of the tool and that the accident would not have occurred if a proper tool had been used, it was reversible error for the court to instruct a verdict for the defendant, although the evidence for the defendant strongly controverted the foregoing facts. *Ham v. Hayward Lumb. Co.*, 566.
3. It is the duty of a master to exercise ordinary care in providing a reasonably safe place for the servant to work. This duty is nondelegable,

Master and Servant—*Continued.*

and the servant has the right to assume that it has been performed. Facts considered, and held to support the finding of the jury that the defendant company was guilty of negligence in leaving a string of cars uncoupled on a siding, plaintiff's duty requiring him to walk along the top of said cars. *St. Louis S. W. Ry. Co. of Texas v. Pope*, 616.

4. A servant never assumes the risk of a danger arising from his master's negligence unless he knows of the act of negligence, or, in the discharge of his duties, it was so open to observation that he will be charged with notice, and is cognizant of the danger incident thereto. *Id.*
5. A servant has the right to assume that the master has performed his duty, and to act upon such assumption, and is not guilty of contributory negligence in so doing. *Id.*
6. When a rule of the defendant company for the guidance of its employes is in writing, and is free from ambiguity and not open to construction, and when the applicability or inapplicability of said rule to the siding in question was a question of fact to be determined by the jury, it was not necessary for the trial court to construe such rule in its charge to the jury. *Id.*
7. The court charged the jury as follows: "If cars were usually or customarily left coupled together, but if they were sometimes or occasionally left uncoupled, then if that fact was known to plaintiff, or if it was obvious to plaintiff while engaged in his work as brakeman, then it became his duty to use ordinary care to ascertain if the cars were uncoupled on the occasion in question, and if he failed to use ordinary care to ascertain whether or not the cars were coupled, then, if he was injured as the proximate result of the cars being uncoupled, he can not recover." Held, when taken in connection with entire charge, not susceptible of the construction that, if the cars were usually or customarily left coupled together, then, as matter of law, no duty rested upon plaintiff to ascertain whether the cars were coupled on the occasion of the injury. But, query, even if so construed, would it not be proper? *Id.*
8. In order to relieve the master from liability for failure to perform a duty the knowledge of the servant must be of the failure to perform the particular duty in question, and not only of his failure to discharge a similar duty on prior occasions. *Id.*
9. A railroad company is not relieved from liability for a negligent act of its engineer in operating a train because such engineer knew, or might have known by the exercise of ordinary care, that the company itself has been guilty of another act of negligence which concurred with his own in causing an injury to another servant. *Id.*
10. The court charged the jury that, if they believed from the evidence that the engineer of the train on the occasion in question stopped the train in the usual and customary manner of stopping trains on defendant's road, under similar circumstances, then the plaintiff assumed the risk from the manner in which the cars were stopped, and was not entitled to recover, even though they believed that, had it not been for the manner in which the cars were stopped, plaintiff would not have been injured. Held, the charge was correct. *Id.*
11. A negligent act imputable to the master, and which can not be anticipated by the servant, is never the subject of assumed risk. *Texas & N. O. Ry. Co. v. McCraw*, 247.
12. The removing of a handcar from the main track of a railway by the section gang in the performance of their duties, and the lifting and placing of the same back upon the track is an operating of the car within the meaning of the fellow servant act of 1897, and the company is liable for injuries sustained by one member of such gang caused by the negligence of other members. *Id.*
13. While plaintiff was ascending a ladder from one floor to another of defendant's building in the prosecution of his duties, the ladder was tilted and caused to fall by certain hoisting machinery in use on the building, whereby plaintiff was injured. The weight of the testimony showed

Master and Servant—*Continued.*

that a stairway had been completed between the two floors, and plaintiff must have known it, and there was some testimony that the men were ordered not to use the ladder any more, but plaintiff denied knowledge of this order. The evidence tended to show that the men continued to use the ladder after the completion of the stairway. Held, it could not be assumed as matter of law that plaintiff knew the danger and assumed the risk of using the ladder while the hoisting machinery was in operation, nor that he was guilty of contributory negligence in using the ladder, knowing that the stairway was completed, and therefore the court erred in giving a peremptory charge for defendant. *Pipkin v. Hayward Lumb. Co.*, 304.

14. In a suit against the owner of a building for personal injuries caused by stepping upon an upturned nail or spike during the construction of the building, it appearing from the evidence that the plaintiff was one of many workmen engaged in the construction of said building, with no authority the one over the other, such workmen were fellow servants, and each assumed, when he entered the common employment, the risk incident to the negligence of the others, and the injury having occurred from the negligence of said fellow servants, the owner of the building was not liable. *Armour & Co. v. Dumas*, 36.
15. To the rule that it is the duty of the master to furnish the servant a safe place to work there is an exception, viz., the master is not liable where the danger to which the employe is exposed is merely transitory, due to no fault of plan or construction, but is one where the work is of such a character that as it progresses the environment of the servant must necessarily undergo frequent changes, and the injury is attributable to one of such transitory changes. In such cases the rule that the master can not delegate to another the duty of supplying a safe place to work has no application. *Id.*
16. The question whether it was contributory negligence to leave open a switch in violation of a rule of the employer was one of fact under the circumstances, there being evidence tending to show that the rule was not enforced. *Missouri, K. & T. Ry. Co. v. Parrott*, 325.
17. A female helper or servant, without any other protector in the community, may be considered as under the protection of her employer in a matter of slanderous charges. *Parham v. Langford*, 31.

Master in Chancery.

1. In the appointment of a master in chancery in a receivership suit the master was directed to ascertain and report to the court the nature, validity and amounts of all claims against the defendant company and to report his conclusions of law and fact upon all interventions in said suit; it was further ordered that said master in chancery should file his reports from time to time and that any party interested in the suit should be heard upon exceptions to the same, provided such exceptions were made before the master in chancery upon the rendition by him of his conclusions in the premises, and upon failure to make exception to said report at said time then the report of the master should stand confirmed. The master thereafter heard the claims of several intervenors and filed his report thereon in court. No exception was taken by the defendant company before the master to his findings; but on the same day on which his report was filed said company filed in court numerous exceptions to the same. Held, the report of the master in chancery should have been approved as conclusive of the issues, and it was error to submit to a jury the issues raised by said exceptions. *San Jacinto Oil Co. v. Culberson*, 401.
2. The proper practice would have been for a party complaining of a master's report to have presented his objections to the master, to the end that he might correct his findings, and if he failed to do so, then to have the master certify along with his report the evidence upon which his contested conclusions of fact were found, so that the court might review the findings. *Id.*

Measure of Damages.

Incapable of exact measurement. See *Damages, 1.*
Loss of society of deceased. See *Damages, 2.*
For persistent trespasses. See *Damages, 3.*
For destruction of fruit trees. See *Damages, 4, 5.*
For loss of crop. See *Damages, 6–9.*
By delay in shipment of cattle. See *Damages, 11.*

Mechanic's Lien.

1. By the terms of a building contract between the owner of the building and the contractor it was provided that in case of refusal or neglect of the contractor to furnish sufficient and proper material and labor, the owner should have the right to supply the same and deduct therefor from the contract price. After the work was partly done, the contractor told the owner that he was financially unable to procure the labor and materials for the completion of the building, and requested the owner to procure and pay for them and to deduct such expenditures from the contract price. This the owner did. Held, that neither the owner nor his building was liable to parties who had furnished material to the contractor, beyond the balance of the contract price remaining in the owner's hands after the completion of the building. *Fall v. Nichols,* 582.
2. A mechanic's lien exists as security for "extras" supplied under the terms of the contract, and this, even after full payment of the original contract price, exclusive of such "extras." *Zollars v. Snyder & Lacey,* 120.

Minors.

Estoppel by acts of guardian. See *Estoppel, 3.*
When not personally liable. See *Partition, 3.*

1. Minors cited by publication, not appearing except by attorney appointed by the court, where no statement of facts was filed as required by statute, and they can show a good defense, are entitled to have the judgment set aside without relying on fraud in its procurement. *Cowan v. Brett,* 570.
2. In a suit against a minor and his mother upon a promissory note executed by the minor alone for the balance due for a buggy and harness sold by the plaintiffs to said minor, it appeared from the evidence that the plaintiffs knew that the purchaser was a minor; that he was living with his mother on her farm; that he then had a buggy; that he was not engaged in any business demanding the use of a buggy; that they would have to look to him for the payment of the note, and that his mother would not pay it. Held, there being no evidence of fraud on the part of said minor, nor that said buggy was a necessary, the minor had the right to avoid said contract, and upon tendering back the buggy and harness received from plaintiffs to have judgment against them for the money and property paid by him to them. *Heffington v. Jackson & Norton,* 560.

Mistake.

In deed made by agent. See *Agency, 5.*
In description of land condemned. See *Eminent Domain, 1.*
In calculation of amount. See *Judgment, 2, 3.*
In rendering judgment by agreement. See *Judgment, 4.*
Correction of description of land. See *Limitation, 15–17.*
In conveyance of land. See *Parol Sale, 1.*

Mortgage.

Where debt is not extinguished. See *Conditional Sale, 1–4.*
Of crops to landlord. See *Landlord and Tenant, 5.*
Misdescription of grantor. See *Name, 1.*
Of school land before completion of title. See *School Land, 2.*

Motion.

For new trial in Justice's Court. See *Practice in Trial Court, 6.*
To quash writ. See *Sequestration, 1.*

Name.

Held idem sonans. See *Telegraph, 3.*
Variance in initial. See *Affidavit, 1.*

1. A chattel mortgage executed by Henry Bethan, but purporting, in the body of the instrument, to be by Henry Bethel, and so indexed, was properly admitted in evidence on proof that the mortgagor was as well known by the latter name as by the former. *Roche v. Dale*, 287.

Negligence.

Causing loss of attached property. See *Attachment, 1.*
By intermediate connecting carrier. See *Carriers of Freight, 3.*
Where goods are destroyed by fire. See *Carriers of Freight, 14.*
Delay in transporting shipment. See *Carriers of Freight, 16, 17.*
Placing cattle in infected pens. See *Carriers of Freight, 19.*
Duty of passenger to inform himself. See *Carriers of Passengers, 8.*
Remaining in railway waiting room. See *Carriers of Passengers, 14.*
Proof as to reasonableness of time. See *Evidence, 15, 16.*
Pleading contributory negligence. See *Evidence, 19.*
Similar acts on other occasions. See *Evidence, 36, 37.*
Experiments to test fact. See *Evidence, 39.*
Withdrawing issue from jury. See *Instructions to Juries, 9.*
Failure to discover fraud. See *Limitation, 16, 17.*
Liability for independent contractor. See *Master and Servant, 1.*
Furnishing improper tools. See *Master and Servant, 2.*
Furnishing safe place to work. See *Master and Servant, 3, 15.*
Assuming risk by servant. See *Master and Servant, 4–11, 13, 14.*
Of master and servant concurring. See *Master and Servant, 9.*
Usual manner of operation. See *Master and Servant, 10.*
Injuries by fellow servants. See *Master and Servant, 12, 14.*
Violation of rule of employer. See *Master and Servant, 16.*
In failing to secure statement of facts. See *Practice on Appeal, 6.*
Failing to register chattel mortgage. See *Principal and Surety, 6.*
Contributing causes of injury. See *Proximate Cause, 1, 3.*
Knowledge of defect in railroad fence. See *Railways, 1.*
Failure to keep gate in repair. See *Railways, 2–4.*
Animals prohibited from running at large. See *Railways, 5, 6.*
Preventing escape of fire. See *Railways, 7.*
Injuring land by overflow. See *Railways, 9, 10.*
License to use footpath on track. See *Railways, 11, 13, 14.*
Violation of city ordinance. See *Railways, 12, 15.*

1. Negligence becomes a question of law only when the act causing injury to another is in violation of statute, or when the undisputed evidence admits only of the inference that the commission of the act in question was negligence. *International & G. N. R. Co. v. Wray*, 380.
2. Where an act is done by one in obedience to an order of his foreman the law will not declare the act of obedience negligence per se unless the danger of obeying the order was so obvious and glaring from the servant's standpoint at the time he undertook to obey it that no prudent man would have undertaken to obey it. *Id.*
3. When a servant is ordered by his vice-principal to take an engine from a siding onto the main track at a time when a train was due to pass said point, it is a question of fact for the jury whether or not the servant was guilty of negligence in failing to keep a lookout for the passing train, and whether or not such failure was the proximate cause of the injury. *Id.*
4. Where the positive testimony of witnesses on a question of negligence is contradicted by physical facts, an issue is thus raised which should be submitted to the jury. *Id.*
5. When defendant pleads only certain acts of the plaintiff as constituting contributory negligence the charge of the court should be confined to

Negligence—*Continued.*

the specific acts of negligence pleaded, and should not be so general as to include the submission of any other acts of negligence. *Id.*

6. Where the facts alleged as constituting contributory negligence are undisputed it was misleading for the court to charge that the burden of proof was upon the defendant to establish its plea of contributory negligence. *Ft. Worth & R. G. Ry. Co. v. Hudgens*, 201.
7. Following the ruling of the Supreme Court herein on certificate of dissent (100 Texas, 9), holding the charge given on contributory negligence sufficiently full to justify refusing further requested instructions, to the same effect but more elaborate, the judgment is affirmed. *Missouri, K. & T. Ry. Co. v Parrott*, 325.
8. The defendant having plead contributory negligence on the part of plaintiff in alighting from a moving train it was probably error for the court to charge that the suggestion of defendant's employes, if any, for plaintiff to alight did not alone justify him in alighting, but was a circumstance to be considered with all the other evidence to determine whether he exercised proper care; but such error, if any, was cured by an instruction in the latter part of the charge wherein the jury are told that they would determine the question of plaintiff's contributory negligence upon the whole evidence. *Texas & P. Ry. Co. v. Whiteley*, 346.
9. Alighting from a moving train is not necessarily negligence per se. *Id.*
10. Contributory negligence will not be attributed to a shipper of cattle in not keeping charge of and feeding his cattle before loading, where he placed them in the loading pens at the instance of the railway agent and on his assurance that the cars for loading them were expected soon, but such cars were delayed, and the cattle suffered damage while awaiting them. *Missouri, K. & T. Ry. Co. v. Kyser & Southerland*, 322.
11. The question as to the effect of intoxicating liquors upon a man is ordinarily one of fact for the jury, and not for the courts. Ordinarily intoxication is simply evidence for the jury to consider in connection with all the attendant facts and circumstances in determining whether an act done by the party under such influence was negligence. *Texarkana & Ft. S. Ry. Co. v. Frugia*, 48.
12. It is not negligence per se for one to fail to look and listen before going on a railroad track. In the absence of any direct evidence upon the question, a jury would have the right to presume as a matter of fact that he did look and listen. *Id.*
13. Where the vital issue in a case is discovered peril, and the testimony is conflicting, that for the plaintiff being sufficient to support the verdict, the court did not err in refusing to instruct a verdict for the defendant, nor in refusing to set the verdict aside. *Texas & P. Ry. Co. v. Brannon*, 531.
14. Charge on discovered peril considered, and held a fair presentation of the law on that subject. *Id.*
15. An engineer is not required to use any means to stop his train as soon as he discovers a man on the track; he has a right to presume that the man will leave the track in time to avoid injury. It is only after the engineer has good reason to believe that the man is unconscious of his peril, or unable to avoid the danger, that he is required to use all the means in his power to stop the train. *Houston & T. C. R. Co. v. Ramsey*, 603.
16. Evidence considered, and held sufficient to support a finding that an engineer was negligent in failing to use the means at his command to avoid injuring one upon the railroad track. *Id.*
17. Plaintiff alleged two grounds of negligence causing his injury, viz.: Failure of the locomotive engineer to give the usual backing signal, and failure to keep a brakeman near the rear end of the train to warn plaintiff of its backward movement. The court in its charge submitted both grounds. Held, proper, because although a code of signals as to the movement of the train, including a signal for backing, had

Negligence—*Continued.*

been established, it was a question for the jury and not the court to determine under the circumstances whether a person of ordinary prudence would have considered a code of signals adequate protection to the employes. *Choctaw, O. & T. Ry. Co. v. McLaughlin*, 523.

18. Where there was nothing in the evidence to suggest any ground of recovery other than those alleged it was not reversible error for the court in its charge to authorize a recovery in general terms if the jury should believe from the evidence that the person in charge of the train in question was guilty of negligence, especially when this was followed by a distinct, disjunctive statement of the two grounds of recovery alleged. *Id.*
19. The engineer in charge of defendant's engine was partially blind and the fireman partially deaf. A child four years of age was struck and injured by the engine while attempting to cross the railroad track; for some time and distance before reaching the crossing the child was in plain view of the engineer and the purpose of the child to attempt to cross the track in front of the engine was evident. Held, if the infirmities of the engineer prevented him from seeing the child, then defendant was negligent in employing him; and if he could, by the exercise of ordinary care, have seen and known that the child intended crossing the track, then his negligence will be imputed to defendant. *Missouri, K. & T. Ry. Co. of Texas v. Nesbit*, 630.
20. The same rules can not be applied to children of tender years as to adults in the matter of negligence; such children can not be guilty of contributory negligence. *Id.*
21. Defendant could not excuse its negligence on the ground that the child would not have been hurt if it had not fallen as it attempted to cross the track. Defendants had no right to assume that an infant four years of age could pass safely across the track in front of its moving engine. It was negligence to permit the exigency to arise. *Id.*
22. Plaintiff alleged that, while in the performance of his duties as a brakeman upon one of defendant's freight trains, the train was stopped by the engineer in such a sudden and unusual manner as to cause him to be thrown to the ground and injured. Evidence considered, and held not only sufficient to require the submission to the jury of the issue of negligence in the respect alleged, but also sufficient to support the verdict of the jury finding the defendant guilty of negligence. *St. Louis S. W. Ry. Co. of Texas v. Pope*, 616.
23. Facts considered, and held insufficient to show negligence on defendant's part, or if negligence, that it was the proximate cause of the killing. *Gulf, C. & S. F. Ry. Co. v. Blake*, 180.

New Trial.

After adjournment of term. See *Garnishment, 4.*

Nonresident.

Jurisdiction to render personal judgment. See *Judgment, 11; Jurisdiction, 3.*
Suit for taxes. See *Service by Publication, 1.*

Notice.

Purchaser for value without. See *Equity, 1.*
By possession of land. See *False Representations, 1.*
By record of field notes. See *Survey, 3.*

Novation.

1. Novation is effected by the substitution of a new obligation between the same parties with the intention to extinguish the old one; or by the substitution of a new debtor with the intention to release the old one; or by the substitution of a new creditor with the intent to transfer the rights of the old one to him. In order to make a novation of the second class above mentioned, there must be a mutual agreement among

Novation—*Continued.*

the parties—the creditor, his immediate debtor and the new debtor—for the substitution of the new debt in the place and stead of the original debt. *Gimble & Sons v. King*, 188.

Nuisance.

Obstructing public road. See *Injunction, 1.*
By operation of railroad. See *Railway, 8.*

Officers.

Showing official position. See *Acknowledgment, 1.*
Acting under void warrant. See *Arrest, 1.*
Authority to execute warrant. See *Arrest, 2.*
Authority to grant bail. See *Arrest, 3.*
Mistaking source of authority. See *Arrest, 4.*
Liability for arrest. See *Sheriff, 1, 2.*
Premature payment of taxes to. See *Taxes, 1–3.*

Off-set.

Matters not incident to claim. See *Foreclosure, 2.*

Opinion.

Reasonable time for transportation. See *Evidence, 15, 16.*
Distance within which train could be stopped. See *Evidence, 17.*
Cause of wreck. See *Evidence, 18.*

Ordinance.

Proof of. See *Evidence, 4.*
Regulating speed of locomotive. See *Railway, 12.*

Overflow.

By water from adjacent stream. See *Railway, 9.*
Liability independent of negligence. See *Railway, 10.*

Parol Gift.

1. In support of a claim of parol gift to a putative wife, evidence that the husband on his death bed handed to her his deeds to the land, which was in their joint possession, saying, "the deeds are yours, and the land," was admissible, though coupled with the declaration, "after I die the land will be yours." It was a question for the jury whether this was intended as a present parol gift (valid) or an attempted parol will (invalid). *Hammond v. Hammond*, 284.

Parol Sale.

1. If a purchaser goes into possession of land bargained for and intended to be purchased, pays the purchase money and makes valuable improvements upon the faith of his contract, his right in equity to claim the benefit of such parol contract of sale will not be affected by the fact that a deed was executed which by mistake conveyed an entirely different tract of land. *Wright v. Isaacks*, 223.

Parties.

Declarations of. See *Evidence, 8.*
Action by county. See *Injunction, 1.*
Not disposed of. See *Judgment, 1.*

1. A judgment against the husband binds the interest of the wife in community real estate, unless she has a defense growing out of her homestead rights. Unless the fact that the land was a homestead is available as a defense the wife is not a necessary party to the suit. *Brown v. Humphrey*, 23.
2. Unless it appears in a suit for land occupied as a homestead, that the homestead character of the property would have afforded a defense

Parties—*Continued.*

to the suit, it is not necessary that the wife should be made a party in order that her right and title be divested by the judgment. *Breath v. Flowers*, 516.

Partition.

Of estate by executor. See *Executor, 1, 2.*
By husband with wife's consent. See *Homestead, 7.*
By unacknowledged deed. See *Married Woman, 1.*

1. Where land is owned jointly and in equal parts by two different parties, but all the improvements thereon belong to one of such parties, and it has been determined by the Court in accordance with the provisions of the General Laws of 1905, that the land is not susceptible of a fair and equitable division, the trial court should order a sale of the property, with instructions that the report of the sale should show the value of the improvements and the value of the land separately, and the proceeds of the sale should then be divided in accordance with the interests of the parties in the property. *Olschewske v. Summerville*, 361.
2. Where one joint owner owns all the improvements on land which is to be partitioned among several owners, the owner of the improvements should be allowed to remove them if he desires to do so, and thus simplify the partition. *Id.*
3. Taxes paid by a tenant in common upon the joint property should be refunded to him pro rata on a partition of the land. But one tenant in common is not liable to his cotenants for rents until an act amounting to an ouster has occurred. Such rents not being a lien on the land, like taxes, a minor cotenant can not be held personally liable for them. *Id.*

Payment.

On certificate of architect. See *Contract, 14.*
Crediting on books. See *Evidence, 10.*

1. Payment is a defense which must be pleaded and proven by the defendant. *Tilt-Kenney Shoe Co. v. Haggarty*, 335.

Penalty.

For unlawfully weighing cotton. See *Public Weigher, 1.*

Plea of Privilege.

After amendment of petition. See *Waiver, 1.*

Pleading.

Costs on trial amendment. See *Amendment, 1.*
Penalty for extortion. See *Carriers of Freight, 8.*
Charge for demurrage. See *Carriers of Freight, 10.*
Goods destroyed by fire. See *Carriers of Freight, 14.*
Cattle placed in infected pens. See *Carriers of Freight, 18, 20.*
Stopping train at station. See *Carriers of Passengers, 6.*
Disclaimer as to land sued for. See *Costs, 1.*
Denying genuineness of indorsement. See *Indorsement, 1.*
Facts not alleged. See *Evidence, 11.*
Contributory negligence. See *Evidence, 19.*
Interest as an element of damages. See *Jurisdiction of County Court, 1, 2.*
Payment as a defense. See *Payment, 1.*
Time of filing. See *Practice in Trial Court, 5.*
Contract in writing. See *Statute of Frauds, 1.*
Description of land sued for. See *Superior Legal Title, 2.*
Agency of sender of message. See *Telegraph, 1.*
Plea of privilege. See *Waiver, 1.*

1. General allegation of the materiality of fraudulent representations charged, with facts pleaded from which it might be inferred, was sufficient as against a general demurrer. *Karner v. Ross*, 542.
2. Every reasonable intendment from the allegations of a pleading taken as a whole will be indulged against a general demurrer. Where from the

Pleading—*Continued.*

allegations of plaintiff's petition the intendment is clear that plaintiff accepted terms of employment offered by defendant, a general demurrer on the ground that there was no specific allegation of acceptance was properly overruled. *International Harvester Co. of A. v. Campbell,* 421.

3. Where the original petition set up damages to crops from an overflow caused by the faulty construction of defendant's roadbed, and an amended petition was but an amplification of the original petition, a new cause of action is not set up. *Gulf, C. & S. F. Ry. Co. v. Pearce,* 387.
4. Where the owner of a note, or one who claims an equity therein alleges and seeks to prove that the holder acquired such note after maturity, and is therefore chargeable with notice of the rights or equities of a prior endorser, such pleading need not be sworn to. *Mayfield Groc. Co. v. Price & Co.,* 391.
5. Allegations by defendant that plaintiffs wrongfully took possession of the crop, and by carelessness damaged the same, will not authorize a recovery upon evidence that plaintiffs took possession of the crop by and with the consent of the defendant for the purpose of gathering it, but damaged the same by negligent methods. *Id.*
6. The allegations of defendant in his answer, as to his experience as a rice farmer and his knowledge of the cost of making a crop of rice, were, in effect, a pleading of evidence, and should have been stricken out on exception. *McFaddin v. Sims,* 599.
7. Where defendant's pleading to a suit for damages for not permitting plaintiff to perform his contract is a denial of the contract, and not a justification of plaintiff's discharge under it, a charge justifying such action on the ground of plaintiff's delay in performance was properly refused. *Jefferson & N. W. Ry. Co. v. Dresson,* 282.
8. Where the plaintiff sought by his pleading to recover only special damages caused by the negligence of the carrier in delaying the transportation of live stock whereby plaintiff was prevented from complying with a contract theretofore made by him, it was error for the court to submit to the jury an issue as to depreciation in the market value of the stock by reason of delay in the transportation. *Texas & P. Ry. Co. v. Stewart,* 399.
9. A general allegation of rough handling would not admit proof of injury to stock caused by a defective car. *Id.*

Pledge.

1. A mere delivery of a certificate of stock endorsed in blank is sufficient to constitute it a pledge without any memorandum to that effect. The pledgee may fill in the blanks, have the stock registered in his own name and receive the dividends. *Davis v. Hardwick,* 71.

Political Party.

1. In a suit to enjoin the Chairman of the Executive Committee of the Republican party in Texas from calling a State convention of said party, on the ground that the action of said committee was illegal, and the individual members of said committee were disqualified from acting, and the place selected was practically inaccessible to a large majority of the members of said party, it appearing that no property rights were involved, a demurrer to the bill was properly sustained and the suit dismissed. A court of equity will not undertake to supervise the acts and management of a political party for the protection of a purely political right. *McDonald v. Lyon,* 484.

Possession.

As notice of adverse claim. See *False Representations, 1.*

Powers.

1. A power of attorney, jointly and duly executed by husband and wife to sell the wife's separate property, is not revoked by the death of the husband. *Skirvin v. O'Brien,* 1.

Powers—*Continued.*

2. Such instruments as powers of attorney must be strictly construed; under no circumstances will the principal be bound beyond the plain import of the language of the instrument. A power to sell and convey does not authorize a conveyance in settlement of adverse claim against principal. *Id.*

Practice.

Rulings on this subject are grouped under more specific heads. See: *Amendment, 1; Appeal, 1; Appeal Bond, 1; Argument of Counsel, 1–3; Assignment of Error, 1, 2; Attachment, 1; Bill of Exceptions, 1–4; Briefs, 1–3; Certiorari, 1; Continuance, 1, 2; Costs, 1–3; Execution, 1; Garnishment 1–5; Harmless Error, 1, 2; Heirs, 1; Injunction, 1; Instructions to Juries, 1–25; Joint Owners, 1; Judge, 1; Judgment, 1–17; Jurisdiction, 1–3; Jurisdiction of County Court, 1, 2; Jurisdiction of District Court, 1–5; Jury, 1–4; Master in Chancery, 1, 2; Minors, 1; Parties, 1, 2; Practice in Trial Court, 1–6; Practice on Appeal, 1–11; Sequestration, 1, 2; Service by Publication, 1; Special Issues, 1; Special Judge, 1; Statement of Facts, 1–4; Trial of Right of Property, 1; Venue, 1–3; Verdict, 1–6.*

Practice in Trial Court.

1. The reading to the court in the hearing of the jury of a case involving the same or similar facts as the case on trial is a matter in the discretion of the trial court, and will not be reversible error in the absence of a showing that such discretion was abused. *Waggoner v. Wyatt*, 76.
2. Where plaintiff's suit is founded upon charges of fraud in procuring a settlement of accounts, and certain other portions of his pleading which charged fraud and treachery in another and distinct transaction were stricken out by the court, and the testimony upon the question of fraud in procuring the settlement was sharply conflicting, it was error to permit the plaintiff to read to the jury that portion of his pleading which had been stricken out. *Simpson v. Thompson*, 273.
3. Where the testimony is conflicting it is reversible error to permit a party to read to the jury portions of his pleading which had been stricken out on exception, and to testify concerning the facts alleged in said pleading, and for the court in its charge to call attention of the jury to such irrelevant transaction. *Id.*
4. It is not improper for the court in a trial without a jury to hear testimony in order to determine its admissibility. *Loring, Guardian, v. Jackson*, 306.
5. Where an answer setting up a meritorious defense had been prepared by counsel for defendants and shown to counsel for the plaintiffs several days before the case was called for trial but was not actually filed until that time, and was then filed without protest or objection on the part of counsel for plaintiffs, and where counsel for plaintiffs upon the filing of such answer exhibited for the first time and filed a supplemental petition containing new matter and which necessitated a continuance of the case by the defendants, it was error for the court of its own motion to strike out the answer of the defendants, and force them into trial merely because the replication of the plaintiff's operated as a surprise and necessitated a continuance of the case. *Zollars v. Snyder & Lacey*, 120.
6. At the request of plaintiffs a justice of the peace rendered a judgment by default against the defendants. On the same day, upon motion of defendants setting up good cause, the justice set aside the judgment by default, over the protest of plaintiff's attorney on the ground that plaintiff was entitled to a full day's notice of said motion. Held, while the action of the justice was irregular, it was not void. Rev. Stats., art. 1651, construed. Aycock v. Williams, 18 Texas, 393, and Smith v. Carrol, 4 Texas Ct. Rep., 295, distinguished. *Lummis Sons & Co. v. Wade* 302.

Practice on Appeal.

Failure to move in trial court. See *Costs, 2, 3.*
Omission of material issues. See *Special Issues, 1.*

1. The Appellate Court may reverse a judgment upon errors assigned, though not presented in compliance with the rules governing briefs, especially where the ruling complained of partakes of the nature of fundamental error. *Pinkston v. Boyd,* 568.
2. Where the facts establishing an estoppel of appellants were clearly established and undisputed, the judgment against them may be sustained on that ground, though no issue as to estoppel was submitted to the jury. *Parker v. Citizens' Ry. Co.,* 168.
3. A mere preponderance of evidence against a verdict will not authorize an Appellate Court to set it aside in the absence of anything in the record showing that it was the result of passion or prejudice. *Texas & P. Ry. Co. v. Bump,* 297.
4. In the absence of a statement of facts it will be presumed that evidence necessary to sustain the judgment was introduced. *Banner v. Rolf,* 88.
5. In the absence of a statement of facts in cases where the judgment is authorized by the pleadings, the ruling of the court upon special exceptions, in giving and refusing charges and in receiving or excluding evidence will not be reviewed. *Smith v. Pecos V. & N. E. Ry. Co.,* 204.
6. The failure or refusal of an official stenographer to prepare and file upon request of either party a transcript of the testimony on the trial, would be cause for reversal upon a proper showing; but before such sequence would follow it must be made to appear that the complainant was not himself guilty of negligence in failing to compel the clerk by mandamus to perform his duty, or failing in this, to have secured and filed a statement of facts in the usual form. *Id.*
7. Where an issue is raised by the pleadings and evidence in the trial court, but not disposed of by the judge, the Appellate Court, upon reversing the judgment of said court, should remand the cause in order that said issue might be disposed of. *Elliott v. Morris,* 428.
8. Conclusions of fact and law voluntarily filed by a trial judge can not be given the force and effect of conclusions filed upon request of either party as provided by the statute, and may be ignored by the party appealing. Rev. Stats., art. 1333. *City of Houston v. Kapner,* 507.
9. An assignment of error that the court erred in its charge because contrary to the undisputed evidence, will not be considered when there is no statement of the evidence. *Ferguson v. Morrison,* 396.
10. An assignment of error which misquotes the record will not be considered. *Id.*
11. In a suit for damage to a shipment of cattle caused by delay in transporting them, the charge of the court upon the measure of damage was unintelligible; no exception was taken to the charge and no counter-instruction asked by appellant. Held, the rule announced in Cook v. Wootters, 42 Texas, 296, that such error is not ground for reversal "unless it clearly appeared that the jury were misled by the charge given and complained of." is not supported by authority. It is the duty of the Appellate Court to reverse for error plainly appearing, unless it can be said from a consideration of the entire record that injury to the complaining party did not result. *Missouri, K. & T. Ry. Co. v. Williams & Scoggin,* 549.
12. Where the testimony of disinterested witnesses who actually weighed the cattle in controversy at the point of shipment and at destination was widely variant from that of witnesses who testified as experts upon hypothetical questions as to the probable shrinkage of cattle under similar circumstances, and the verdict was contrary to the testimony as to the actual shrinkage, the Appellate Court can not say that an error in the charge of the trial court upon the measure of damage was not prejudicial to appellant. *Id.*

Presumption.

As to gift made to child. See *Advancement, 2.*
Of mental suffering from physical injury. See *Carriers of Passengers, 13.*

Presumption—*Continued.*

Of knowledge of general custom. See *Custom, 1.*
From separation of husband and wife. See *Divorce, 1.*
In support of judgment. See *Judgment, 7, 8.*
That evidence sustained judgment. See *Practice on Appeal, 4.*

Principal and Surety.

Bond of sheriff. See *False Imprisonment, 3.*

1. If a creditor, without the consent of the surety, parts with or renders unavailable any security or fund which he has the right to apply to the satisfaction of the debt, the surety is discharged to the extent of the value or the impairment of the value of such security; this results from the surety's right of subrogation—to pay the debt and take the security. *Kempner v. Patrick*, 216.
2. If the creditor, without the consent of the surety, voluntarily advanced to the debtor an additional amount of money upon the security in the possession of the creditor, thus impairing or destroying the security, the surety would be discharged pro tanto, if such advancement absorbed any part of the security. *Id.*
3. This, however, would not be the result if the additional advancement was made by reason of the terms of the original contract, or because of a general custom known to the surety. *Id.*
4. When the purchaser of mortgaged property, as a part of the consideration therefor, assumes the payment of the mortgage note, he becomes primarily liable therefor, and the maker of the note occupies the position of a surety. *Long v. Patton, 11.*
5. If the holder of the note extends the time of payment at the request of the party who has assumed its payment, the maker is thereby released. *Id.*
6. Where at the time a promissory note was executed by a principal and surety, the principal gave to the payor a chattel mortgage to secure the payment of said note, and the payor negligently failed to have said mortgage registered, whereby the security was lost, the surety was thereby discharged. *Bennett v. Taylor, Executrix*, 30.
7. A debtor gave to a surety upon his note a deed of trust upon four sections of land to indemnify such surety against loss; thereafter the debtor contracted to sell the mortgaged land and gave a bond for title with the surety upon the note as surety upon said bond, and said surety transferred to the holder of the note the indemnity mortgage held by him. Held, that the deed of trust constituted a fund to secure the debt itself and inured to the benefit of the holder of the note independently of the transfer executed by the surety, and hence the holder of the note was not estopped by the action of the surety in signing the bond for title to the purchaser. *Harwell v. Harbison*, 343.

Privileged Communication.

1. A letter between the general attorney of a corporation and the local attorney of such corporation, concerning an issue on the trial, is a privileged communication. *Missouri, K. & T. Ry. Co. v. Williams & Scoggin*, 549.

Proximate Cause.

Breach of contract to furnish material. See *Damages, 10.*

1. Where the wife of the plaintiff had consumption at the time of her exposure to cold through the negligence of the defendant, and such negligence reasonably and naturally aggravated the disease and hastened her death, the defendant would be liable if such death was a proximate result of said negligence. In such case the defendant's negligence would be a contributing cause of the death, and the negligence could not be excused on the ground that death would have occurred later. This fact goes only to the amount of damages. *Chicago, R. I. & G. Ry. Co. v. Groner*, 264.
2. In a case where a plaintiff died during pendency of her suit for damages for personal injuries, and the action was continued by her heirs, who

Proximate Cause—*Continued.*

made themselves parties, the evidence is held sufficient to show that the proximate cause of the death was not such injury, but sickness from other causes, and the suit held maintainable, following ruling on previous appeal. Ellyson v. International & G. N. R. R. Co., 75 S. W. Rep., 868. *International & G. N. R. Co. v. Ellyson*, 45.

3. On the issue whether death was to be attributed to personal injury as its proximate cause, the evidence showing that it was brought about by a combination of weakened condition from the injuries and of an attack of diarrhea, the following definition was held not erroneous: "The proximate cause is that which, in its natural sequence, unbroken any efficient intervening cause, produces the death, and without which it would not have occurred. The remote cause is that which some independent force merely takes advantage of to produce a death which is not the natural and probable effect of such cause." *Id.*

Public Policy.

Occupation tax a revenue law only. See *Land Agent, 1.*

Public Road.

Obstruction of. See *Injunction, 1.*

1. Owners of land who have agreed to donate same for a public road and waive their claim for damages if the county would establish and maintain it can not question the validity of the order of the Commissioners' Court directing the opening of it on the ground that the proceedings were irregular and insufficient to give the court jurisdiction. *Patterson v. Hill County*, 546.

Public Weigher.

1. In an action by a public weigher to recover the statutory penalty on account of others weighing cotton in his territory (Acts of 1889, ch. 155, p. 264) the petition must allege that the defendants were factors, commission merchants, or persons similarly situated, in order to bring the case within the statute. *Gray v. Eleazer*, 417.

Question of Fact.

Between mortgage and absolute conveyance. See *Conditional Sale, 1–4.*
Whether conduct was negligent. See *Negligence, 1, 2, 4, 8, 9, 11, 13, 16, 17, 22.*

Railways.

Authority of agent to contract. See *Carriers of Freight, 1.*
Authority of brakeman. See *Carriers of Freight, 2.*
Contract against negligence. See *Carriers of Freight, 3.*
Publication of freight rates. See *Carriers of Freight, 4.*
Contract as to feeding. See *Carriers of Freight, 5.*
Deviation from route. See *Carriers of Freight, 6.*
Right to route stock shipment. See *Carriers of Freight, 7.*
Penalty for extortion. See *Carriers of Freight, 8.*
Charge for demurrage. See *Carriers of Freight, 9, 10.*
Liability of connecting carrier. See *Carriers of Freight, 11.*
Presumption against last carrier. See *Carriers of Freight, 12.*
Delivery to connecting carrier. See *Carriers of Freight, 13.*
Loss of goods by fire. See *Carriers of Freight, 14.*
Action by consignee. See *Carriers of Freight, 15.*
Negligent delay in transportation. See *Carriers of Freight, 16, 17.*
Cattle placed in infected pen. See *Carriers of Freight, 18–20.*
Keeping ticket office open. See *Carriers of Passengers, 1, 2.*
Ejection for refusal to pay fare. See *Carriers of Passengers, 3, 4.*
Ratifying contract of initial carrier. See *Carriers of Passengers, 5.*
Failure to stop at station. See *Carriers of Passengers, 6, 8, 9.*
Conduct of conductor to passenger. See *Carriers of Passengers, 7.*
Duty of train porter. See *Carriers of Passengers, 10.*
Riding on freight train. See *Carriers of Passengers, 11.*

Railways—*Continued.*

Unwarmed waiting room. See *Carriers of Passengers, 12–14.*
Injury by fall of market. , See *Damages, 11.*
Breach of contract for construction. See *Damages, 12, 13.*
Proof of city ordinances. See *Evidence, 4–7.*
Wrongful expulsion from train. See *Damages, 14.*
Personal injury to traveler on highway. See *Damages, 15.*
Injury to aged woman. See *Damages, 16.*
Loss of leg by child. See *Damages, 17.*
Loss of services of wife. See *Death, 1.*
Former testimony of conductor. See *Evidence, 9.*
Proof of market value. See *Evidence, 13.*
Proof of reasonableness of time. See *Evidence, 15, 16.*
Expert on stopping trains. See *Evidence, 17.*
Opinion as to cause of wreck. See *Evidence, 18.*
Pleading contributory negligence. See *Evidence, 19.*
Market value of grass burned. See *Evidence, 34.*
Proof of weight of cattle. See *Evidence, 35.*
Similar unrelated acts of negligence. See *Evidence, 37.*
Experiments to ascertain facts. See *Evidence, 39.*
Termination of transit. See *Interstate Commerce, 1.*
Federal law requiring automatic couplers. See *Interstate Commerce, 2.*
Negligence of independent contractor. See *Master and Servant, 1.*
Furnishing safe place to work. See *Master and Servant, 3, 15.*
Risks assumed by servant. See *Master and Servant, 4–11, 13, 14.*
Concurring negligence. See *Master and Servant, 9.*
Usual manner of operating train. See *Master and Servant, 10.*
Injuries by fellow servants. See *Master and Servant, 12, 14.*
Violation of rule by employe. See *Master and Servant, 16.*
Question of fact. See *Negligence, 1, 4.*
Obedience to order of foreman. See *Negligence, 2.*
Keeping lookout for passing train. See *Negligence, 3.*
Pleading contributory negligence. See *Negligence, 5.*
Burden of proving contributory negligence. See *Negligence, 6.*
Charge on contributory negligence. See *Negligence, 7, 8.*
Alighting from moving train. See *Negligence, 8, 9.*
Failure of shipper to feed stock. See *Negligence, 10.*
Drunken man on track. See *Negligence, 11, 12.*
Discovered peril. See *Negligence, 13–16.*
Failure to observe code of signals. See *Negligence, 17.*
Employes with defective sight or hearing. See *Negligence, 19.*
Injuries to children. See *Negligence, 19–21.*
Manner of stopping trains. See *Negligence, 22.*
Dog killed by train. See *Negligence, 23.*
Rendition of railway track. See *Taxation, 1.*
Premature payment of taxes. See *Taxes, 1–3.*

1. The effect of the law with regard to fencing railways is superseded by the adoption of the law prohibiting stock from running at large; and one who turns his stock into his field, where such stock law is in force, knowing that no sufficient fence prevents access of stock therefrom to the railway track can recover for the killing it by a train only on proof of negligence. *Houston & T. C. Ry. Co. v. Nussbaum & Scharff*, 410.
2. The railway track being fenced, a gate was put therein for the convenience of the owner of adjoining land, with a device for automatically closing and latching, which was suffered to get out of order so that it was necessary for those using it to tie it with a rope. Plaintiff's horse, entering thereby when it was neither latched nor tied, was killed by a train. Held, that there was sufficient evidence of defendant's negligence in failing to keep the gate in repair to require submission to the jury. *Cole v. St. Louis S. W. Ry. Co.*, 419.
3. In a suit for the value of animals killed by defendant's train the evidence showed that the animals escaped from plaintiff's enclosure through a gate at a private crossing onto defendant's right of way;

Railways—*Continued.*

that the gate had become defective, and that it would have cost from twenty-five cents to two dollars to have repaired the same. Held, that whether or not the defect was so trivial as to have made it the duty of the plaintiff to repair the same was a question of fact for the jury, and the court did not err in refusing a peremptory instruction for the defendant. *Missouri, K. & T. Ry. Co. v. Dunnaway*, 350.

4. Plaintiff's stock were allowed to run in an enclosure separated from a cotton field by a fence consisting of only one strand of wire; from the enclosure they escaped into the cotton field and thence through a defective gate onto the right of way. Held, plaintiff was not guilty of contributory negligence. *Id.*
5. A railway company is not liable, in the absence of gross negligence, for the value of stock killed or injured by its locomotives in a precinct where the stock law is in force, nor does the burden rest upon the employes of the company to keep a lookout for stock in such cases. *Ft. Worth & R. G. Ry. Co. v. Hudgens*, 201.
6. Where there was no evidence that the road was fenced, nor that the place of killing was at a crossing, nor within switch limits, it was error for the court to charge the jury that when the killing occurred at a place not a street or road crossing or switch limits or where the right of way was not fenced, then proof of the accident is negligence per se. *Id.*
7. In a suit for setting fire to grass by sparks from a locomotive, there being no evidence as to the character or condition of the spark arrester on the locomotive, it was error to submit that issue to the jury. *Texas & P. Ry. Co. v. Pemberton*, 291.
8. Railroad companies, in the absence of evidence that their business is improperly or negligently conducted, are not liable in damages to adjacent residents for personal annoyance, discomfort or inconvenience necessarily resulting from and incident to the lawful operation of their trains and locomotives along the streets of a town. It is otherwise as to injury to property. *Oklahoma, C. & T. R. Co. v. Scarborough*, 338.
9. The provisions of article 4436 of the Revised Statutes apply to water overflowing from an adjacent stream as well as to surface water. *Gulf, C. & S. F. Ry. Co. v. Pearce*, 387.
10. The right to recover damages for flooding plaintiff's land, caused by construction of a railway, is not dependent on negligence in the construction. It is given by the statute (Rev. Stats., art. 4436), wherever the company fails to construct the necessary culverts and sluices, as the natural lay of the land requires for the necessary drainage thereof. *Missouri, K. & T. Ry. Co. v. Crow*, 280.
11. If a portion of the roadbed of a railway has been commonly and habitually used for a long time by the public as a footpath, with the knowledge and acquiescence or by the permission of the company, it is considered as having licensed the public to use such portion of its roadbed for that purpose. So with regard to a crossing over its track. *Texarkana & Ft. S. Ry. Co. v. Frugia*, 48.
12. The violation of city ordinances regulating the speed of locomotives within its corporate limits, and forbidding the running of locomotives at night without a headlight is negligence, and renders the guilty party liable for an injury proximately caused by such negligence. *Id.*
13. At such places as the public are accustomed to use a railroad track it is the duty of the railroad employes to keep a lookout. *Id.*
14. The substance of the issue in this case being whether deceased was negligently killed within the limits of the city of Beaumont at a point on its road commonly used by the public with the knowledge and acquiescence of the railroad company, the court properly refused to confine the jury to any particular locality, the substance of an issue is all that need be proven. *Id.*
15. Where facts are uncontroverted they should not be submitted to the finding of the jury, but should be assumed by the charge as established. A violation of the city ordinances by defendant having been proved, it was only necessary for plaintiff to prove that such negligence was

Railways—*Continued.*

the proximate cause of his injury, unmixed with contributory negligence on his own part. *Id.*

Ratification.

1. The burden of proving ratification is on the party asserting it. There can be no ratification without full knowledge of the facts. Ratification of deed of agent must be by deed of principal. Mere delay in repudiating will not have the effect of ratifying. *Skirvin v. O'Brien*, 1.

Recitals.

In ancient instrument. See *Administrator's Deed, 1.*

Record.

What included in. See *Judgment, 13.*

Record of Title.

Officer giving certificate. See *Acknowledgment, 1.*

1. Following the record of a deed and the certificate of acknowledgment on a deed record book was the following certificate: "I hereby certify that the above and foregoing is a true and correct copy of the original deed from Sarah Davis, administratrix, and Isaac H. Roberts, administrator of the estate of W. P. Davis, deceased, to G. W. Grant, that the the same was presented for registration on the 15th day of September, A. D. 1848, at 10 o'clock a. m., and duly registered this day at 9 o'clock a. m." Held, to mean that the original deed, and not a copy of the same, was copied by the officer into the record book. *Williams v. Cessna*, 315.
2. Under the statute of 1846 it was not necessary that a subscribing witness to a deed, in proving the same for registration, should make oath that he signed the same as a witness at the request of the grantor. The cases of Dorn v. Best, 15 Texas, 62; Downs v. Porter, 54 Texas, 64; Jones v. Robbins, 74 Texas, 615; Cox v. Rust, 29 S. W. Rep., 808; Deen v. Wills, 21 Texas, 642, and Sowers v. Peterson, 59 Texas, 220, reviewed. *Id.*

Remainder.

Devisee of estate in. See *Wills, 3.*

Res Adjudicata.

Matters settled on appeal. See *Judgment, 17.*

Rescission.

Because of false representation. See *Contract, 20.*
For fraud in sale of land. See *False Representations, 1, 2.*
Statements honestly made. See *False Representations, 7, 8.*

Sales.

By survivor to pay debt. See *Community Property, 2.*
Whether amounting to mortgage. See *Conditional Sale, 1–4.*
Of goods on Sunday. See *Contract, 16.*
Of homestead in administration proceedings. See *Estoppel, 3.*
Under dormant judgment. See *Execution Sale, 1.*
Of land by independent executor. See *Executor, 3.*

1. Evidence considered and held to sustain a finding that a sale of cattle was intended to transfer the title to the purchaser, and not merely an arrangement for the seller to continue as owner carrying them and the mortgages upon them in the name of nominal purchaser. *Gage v. Hunter*, 241.
2. In a sale by sample there is an implied warranty by the seller that the goods will be of the same quality as the sample, and the buyer has the right to inspect the goods upon their arrival, notwithstanding the order provided for delivery f. o. b. cars at seller's factory. *Keller v. Paulus Mfg. Co.*, 555.

Sales—*Continued.*

3. Where some of the goods tendered the buyer were not according to sample, and all the goods, those according to sample and those not according to sample, were packed together, the buyer could not be required to separate the good from the bad and accept the good, but had the right to reject the entire shipment. *Id.*
4. The defendant plead that the order for the goods had been countermanded; the court found as a conclusion of fact that the order was not subject to countermand, but also found that some of the goods were not according to contract and that all the goods were packed together. Held, the burden of proof was upon the plaintiff to show a compliance on its part with the contract; failing in this, it was not entitled to recover on the contract, although the defendant assigned a different reason for refusing to pay for the goods. *Id.*

School Land.

1. In a contest between applicants to purchase school land from the State the evidence for the defendant as to actual settlement on the land was, in substance, that on the evening of September 22, 1902, he drove upon the land with his wagon and buggy, in which were contained all his household goods and means of living; that on the next day he drove to the county seat in his buggy, leaving his wagon and household goods upon the land, and made application to purchase the land; that he used his covered wagon as his place of abode until he constructed a house and made other substantial improvements in November following; that the lumber, wire, posts and stock feed were put upon the land in October; that he moved upon the land for the purpose of making it his home and had continuously thereafter resided on the land; that he was a widower without family. The plaintiff settled upon the land and made application to purchase the same two years later. Held, that the evidence of actual settlement by defendant was sufficient to support a verdict for him. *Smith v. Florence*, 547.
2. A mortgage upon school land executed by a purchaser of the same before he had completed the three years' occupancy required by law, is valid and enforceable, and this even against a vendee of such purchaser after said vendee had completed and made proof of the requisite occupancy. *Harwell v. Harbison*, 343.

Sequestration.

1. A motion to quash a writ of sequestration may be filed and acted on at any time before the case is disposed of. *Gravity Canal Co. v. Sisk*, 194.
2. It appeared from the application for sequestration that plaintiff claimed an undivided portion of a crop, and that such portion had not been designated or set apart to plaintiff in any way by which it could be identified. Held, the sequestration proceedings were properly quashed on the ground that the property sought to be subjected to the writ was not sufficiently described to enable the officer to identify it. *Id.*

Service by Publication.

1. In a suit for delinquent taxes the affidavit for service by publication upon a nonresident or unknown owner, required by article 5232o, Sayles' Civil Statutes, is a condition precedent to the court's power to inquire into the merits of the action. A citation by publication is not authorized without such affidavit and a judgment without citation is void. *Stoneman v. Bilby*, 293.

Sheriff.

1. The liability of sureties on a sheriff's official bond is limited to his official acts as distinguished from those in which his official character forms the pretense or color, not the authority. Hence the sureties on a sheriff's official bond are not liable for the arrest and imprisonment of a person by their principal without lawful authority. *Sneed v. McFatridge*, 592.
2. By the provisions of our Code of Criminal Procedure, article 238, a

Sheriff—*Continued.*

warrant of arrest issued by a magistrate other than a judge of the Supreme Court, Court of Appeals, District or County Court, can not be executed in any other county than the one in which it issues, unless endorsed by one of said judges or by some magistrate of the county in which the accused is found. Hence an arrest in H. County, by virtue of a warrant of arrest issued by a justice of the peace in and for L. County, and not endorsed as above required, was unlawful, and an extra-official act of the officer making the arrest, for which his sureties would not be liable, but for which the officer himself would be. *Id.*

Slander.

Protection of female servant against. See *Master and Servant, 17.*

Special Issues.

Where general verdict is returned. See *Verdict, 3, 4.*

1. Even though a material issue should not be submitted to the jury, still the judgment will be sustained if an answer to the question can be found from the evidence in the record. *Dunlap v. Raywood Rice, C. & M. Co.*, 269.

Special Judge.

Trial while regular judge was sitting. See *Judge, 1.*

1. A special district judge may be elected on the first day of the term of court, when the regular judge is absent. *Cox v. Oliver*, 110.

Specific Performance.

1. In an action for specific performance upon an ordinary contract for the purchase of realty, where the vendor's title by limitation is so clearly established as to make it a matter of law as distinguished from a question of fact, the contract will be enforced; but when the state of the evidence is such as to make the question of title one of fact which must be submitted to the jury, as is ordinarily the case, specific performance of the contract will not be decreed. *Greer v. International Stock Yards Co.*, 371.
2. Where a contract for the purchase of property is made subject to the approval or acceptance of the title by the purchaser's attorney, if such attorney disapproves of the title or refuses to accept the same, the vendor can not enforce specific performance of the contract, in the absence of bad faith and unreasonableness on the part of the attorney. *Id.*

Statement of Facts.

Rulings not reviewed without. See *Practice on Appeal, 5, 9.*
Failure of appellant to secure. See *Practice on Appeal, 6.*

1. A separate document, sent up with the transcript, endorsed "statement of facts," purporting to contain all the facts proven on the trial, and approved and signed by the judge, but not showing otherwise that it is the official stenographer's transcript of the evidence, nor that it was submitted to the interested parties for their objections, nor that the documentary evidence it contained was embraced therein by direction of the court does not comply with the law (Acts 29th Leg., Regular Session, p. 219) and can not be considered as a statement of facts. *Pirtle v. Nell*, 418.
2. When the caption of the transcript of the evidence identifies the case in which it was prepared by style and number, and by a statement of the cause tried, and date of trial, and gives the names of the attorneys for each party, it fully identifies the cause to which it relates. *Gulf, C. & S. F. Ry. Co. v. Pearce*, 387.
3. An agreement of parties to a statement of facts prepared by a stenographer while proper is not necessary under the law of 1905, and the certificate of the trial judge need not show that a disagreement existed before such statement was approved by him. It is sufficient if the

Statement of Facts—*Continued.*

official stenographer prepared the transcript of the evidence at the request of one of the parties. *Id.*

4. The stenographer's statement need only contain oral evidence, objections to same, rulings of the court, etc. Documentary evidence is not required to be copied into such statement, but may be sent up in the original form at the request of either party by written direction of the court, or transcribed by the clerk into the record. *Id.*

Statutes.

Title of amendatory act. See *Constitutional Law, 1–3.*

Statutes Cited.

[Revised Statutes, 1895.]

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Article 3198. Adverse possession. *Link v. Bland*, 522.

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Article 505. Assault and battery. *Parham v. Langford*, 32.

[Code of Criminal Procedure.]

Article 238. Warrant of arrest. *Sneed v. McFatridge*, 595.

Statute of Frauds.

1. In a suit affected by the statute of frauds the petition will be sufficient if it allege a contract generally without stating whether it is in writing or not. As an obvious corollary to this rule it would seem that the statute of frauds as a defense must be pleaded. Hart v. Garcia (63 S. W. Rep., 922) modified. *International Harvester Co. of A. v. Campbell*, 422.
2. A peremptory instruction, which does not disclose the ground on which it is asked, does not so raise the question of the statute of frauds as to make it available on appeal. *Id.*
3. While, in a suit on a contract, a general denial is sufficient to let in the defense of the statute of frauds, the defendant must make his defense good by objecting to parol evidence to prove the contract, and a failure to do so operates as a waiver of the statute if not specially pleaded. *Id.*
4. Where the petition alleged that the contract sued on was executed in the name of W., but that the same was in fact the contract of the defendant, and was executed by W. as defendant's agent, and for defendant's benefit, and that the lumber sold under said contract and

Statute of Frauds—*Continued.*

delivered to W. was in fact sold and delivered to defendant under its express agreement and promise to pay for the same, that provision of the statute of frauds which requires an agreement to answer for the debt, default or miscarriage of another to be in writing and signed by the party sought to be charged therewith, has no application. *Southern Pine & C. Co. v. Bruce Lumb. Co.*, 150.

Stenographers.

Report as statement of facts. See *Statement of Facts, 1, 4.*

Stock.

Pledge by delivery of certificate. See *Pledge, 1.*

Street.

Designation upon plat. See *Dedication, 1.*

Sunday.

Purchase and delivery of goods. See *Contract, 16.*

Superior Legal Title.

Purchaser at execution sale. See *Equity, 1.*
Vendor's lien reserved. See *Evidence, 33.*

1. Where the vendor released the lien for purchase money on various portions of the land, sold by vendee to third parties, he could, on refusal of the vendee to pay the balance of the purchase money, recover, in trespass to try title, the part of the land still held by the vendee. *Smith, Administrator, v. Owen*, 411.
2. The plaintiff, seeking to recover back land from the vendee on account of refusal to pay the purchase money, and where he has released the lien on portions sold off by the vendee, should, it seems, describe the land remaining in the vendee's hands and sought to be recovered, and not sue for an undivided interest in the entire tract originally sold. *Id.*

Sureties.

On sheriff's bond. See *False Imprisonment, 3.*
On forthcoming bond. See *Foreclosure, 1.*
Release of by extension of note. See *Indorsement, 3, 4.*
Release of maker of note. See *Indorsement, 4.*
Liability for principal. See *Sheriff, 1.*
Discharge by release of security. See *Principal and Surety, 1–3.*
Assumption of payment by purchaser. See *Principal and Surety, 4.*
Release by extension of time. See *Principal and Surety, 5.*
Release by failure to record. See *Principal and Surety, 6.*
Selling property to pay debt. See *Community Property, 2.*

Survey.

1. The courts can not hold a location and survey invalid, as against a subsequent locator, for failure to treurn the field notes and certificate to the general land office in a reasonable time, where the Legislature, by relief acts, has extended the time allowed by statute for such return. *Waterhouse v. Corbett*, 512.
2. A junior location and survey can not prevail over a prior one, as being by an innocent locator without notice, where it appears to have been made in recognition of such prior survey and presents merely a question of conflict by overlapping boundaries. *Id.*
3. The record, in the surveyor's office, of the field notes of a survey actually made, is authorized by law and is notice to subsequent locators. It will be presumed that the surveyor had possession of the certificate, and it is not necessary to show, as against one claiming under a subsequent location and survey, that the certificate was left on file in his office. *Id.*

Taxation.

Of right to fish in public water. See *Fisheries, 1.*
Of occupation of land agent. See *Land Agent, 1–3.*

1. The requirement to give the abstract number and number of certificate in rendering lands for taxation (Rev. Stats., arts. 5118, 5119) does not apply to the track of a railway company (Rev. Stats., arts. 5073, 5082), which is required to render its road as an entirety; and the assessor, in placing on the rolls as unrendered a part of the mileage omitted, need not describe it more fully than by giving the length of road omitted as a whole; and foreclosure for the back taxes on the unrendered portion could be had on such undivided part of the line through the county. *State v. St. Louis S. W. Ry. Co.*, 533.

Tax Collector.

Premature payment to. See *Taxes, 1.*
Remedies on default. See *Taxes, 2, 3.*

Taxes.

Paid by tenant in common. See *Partition, 3.*
Suit against nonresident. See *Service by Publication, 1.*

1. The payment of taxes to a tax collector before they are due and before the tax rolls had been delivered to him, is not binding on the State. *Texas & N. O. R. Co. v. State*, 580.
2. For the collection of taxes prematurely paid to a collector who afterwards defaulted the State has two remedies; one against the collector and his bondsmen; and the other against the taxpayer. Orange Co. v. Texas & N. O. Ry. Co., 80 S. W. Rep., 670, followed. *Id.*
3. By arrangement between the bondsmen of a defaulting tax collector and the attorney for the State it was agreed that in consideration of said attorney forbearing suit against said bondsmen for the amount of taxes prematurely paid by a certain taxpayer to said collector the bondsmen would at their own expense prosecute a suit in the name of the State against said taxpayer for the taxes so prematurely paid and in the meantime would deposit with the State the amount of taxes claimed by it, to abide the successful result of said suit. Held, said arrangement was no defense to the taxpayer in the suit instituted in pursuance thereof. The payment by the bondsmen of the amount of the taxes to the attorney for the State did not in fact discharge the State's claim. *Id.*

Telegraph.

1. A petition which alleged the sending of the following telegram: "Come to Foreman Stubbs. Come White Fish road: Case important. Rush. Answer. (Signed) W. A. Stubbs;" that the sickness of plaintiff's wife was the cause of sending the message, and that the sender was plaintiff's brother, which facts were made known to defendant by the sender, was not subject to demurrer on the ground that it failed to allege or show that the sender was agent for the plaintiff. *Western U. Tel. Co. v. Stubbs*, 132.
2. The case being one of negligence or nothing, it was error for the court to submit the issue of a parol agreement modifying the written contract on the telegraph blank. *Id.*
3. The names "Warford" and "Wafford" are of such similarity in sound as reasonably to indicate the same person, and therefore a telegraph company would be charged with the duty of delivering a message addressed to Frank Warford to J. F. Wafford. *Western U. Tel. Co. v. Wafford*, 589.

Tenant in Common.

Payment of taxes by. See *Partition, 3.*

Trespass to Try Title.

Land in another county. See *Jurisdiction of District Court, 2.*
Suit by one of several joint owners. See *Joint Owners, 1.*

1. When adjoining owners have purchased land from a common vendor, and

Trespass to Try Title—*Continued.*

there is a dispute between them about their boundary line, each claiming that his tract extends over on that claimed by the other, such vendor is the common source of title as to that part of the land in controversy. *Young v. Trahan*, 611.

2. Where, in trespass to try title, the plaintiff introduces evidence for the purpose only of showing common source of title, such evidence will not be considered as showing title in the defendant unless introduced by him. *Id.*

Trial of Right of Property.

1. In a trial of the right of property when the judgment is against the claimant and provides for the return by him of the property in controversy and for payment of the reasonable value of the use of the property while in his possession, the judgment should fix the amount of such use, rent or hire. *Teague v. Ryan*, 565.

Variance.

Evidence admitted without objection. See *Instructions to Juries, 21.*

Vendor and Purchaser.

Covenant to remove lien. See *Estoppel, 1, 2.*
Superior legal title. See *Evidence, 33.*
Title by limitation. See *Specific Performance, 1.*
Title rejected by attorney. See *Specific Performance, 2.*

Vendor's Lien.

Nonpayment of purchase money. See *Superior Legal Title, 1, 2.*

Venue.

In trespass to try title. See *Jurisdiction of District Court, 2.*

1. It appearing, from the allegations of plaintiff's petition, that the defendants, a constable of L. County and the sheriff of H. County, acted together in his unlawful arrest and imprisonment, an action for damages could be maintained against both of them in L. County. *Sneed v. McFatridge*, 593.
2. By agent or representative as used in section 25 of art. 1194, of the Revised Statutes, is meant a fixed or permanent agency in the county in which the suit is instituted; and by the term "local agent" used in article 1223 is meant one who serves his principal in a certain, fixed locality. An attorney at law is not such agent. *Bay City Iron Works v. Reeves & Co.*, 254.
3. The word "accrued," as used in the statute, means "arose," and suit may be brought in the county in which the cause of action or a part thereof began to have a legal existence. Facts considered, and held, that the court erred in dismissing plaintiff's suit. *Id.*

Verdict.

Omission of material finding. See *Special Issues, 1.*

1. On the return of a verdict not in the proper form nor responsive to the charge, it was proper for the court to refuse to receive it and to give the jury instructions for its correction. *Roche v. Dale*, 287.
2. The provision in article 1323, Revised Statutes, that the verdict in a civil case "shall be in writing and signed by the foreman of the jury" is directory, and objection to the verdict on this ground, after it has been received and the jury discharged, comes too late. *Dunlap v. Raywood Rice, C. & M. Co.*, 269.
3. Where a case is submitted to the jury on special issues alone, and the jury, besides answering the special issues, returns a general verdict also, the general verdict should be disregarded by the court in rendering judgment. *Id.*
4. On the issue whether a building contractor had complied with his undertaking, the jury, in response to one question propounded them, found that he had substantially complied, and to two other questions found

Verdict—*Continued.*

that he had not complied "to the letter." Held, a finding of substantial compliance. *Carnegie P. L. Assn. of B. v. Harris*, 165.

5. In trespass to try title the following verdict was rendered: "We the jury find a verdict for defendant, Richard Bland, allowing him to retain the 160 acres of land with all improvements thereon." Held, in view of the pleadings and charge of the court, sufficient to authorize a judgment for the 160 acres claimed by defendant and described in his answer. *Link v. Bland*, 519.
6. In a suit by the owner of a building against a contractor and the surety on his bond for failure to complete said building, the jury returned the following verdict: "We, the jury in this case, find for the plaintiff to the amount asked, namely $902.92, against the defendant bond company, and judgment against the defendant McKenzie in favor of the bond company for like amount, together with $200 attorney's fees." Held, sufficient to support a judgment in favor of plaintiff against both defendants. *McKenzie v. Barrett*, 451.

Verification.

Note purchased after maturity. See *Pleading*, 4.

Waiver.

Of objection to testimony. See *Evidence*, 24.
Of forfeiture of lease. See *Landlord and Tenant*, 3.

1. In an action for fraud, after defendant's plea of privilege to be sued in his own county was overruled, plaintiff amended alleging the fraud to have been committed in the county where the suit was brought. Defendant, who plead to and went to trial on such amended petition without reasserting his plea of privilege, waived same thereby and submitted to the jurisdiction. *Karner v. Ross*, 542.

Warranty.

In sales by sample. See *Sales*, 2.

Wife's Separate Property.

Title acquired by limitation. See *Community Property*, 1.

Will.

Order of probate. See *Administration*, 1.
Instrument not testamentary. See *Deed*, 6, 7.
Disposing of entire community estate. See *Estoppel*, 4.
Taking property under. See *Estoppel*, 5.
Sale by independent executor. See *Executor*, 3.

1. A testatrix provided by her will as follows: "I want what I have to be equally divided between my five children, namely: V. E. C., M. F. C., W. B. C., B. F. B. C., L. L. C. I want L. L. C. to give bond for the amount he gets. I want his part for him for his life, and at his death, if he dies without lawful children, I want his part paid to my two grandchildren, B. W. C., W. C., D. J. C.'s children." Held, said will gave to L. L. C. only a life interest in one-fifth of said estate, with remainder to the grandchildren named. *Cochran v. Cochran, Executor*, 259.
2. L. L. C. died without children. After the death of the testatrix he adopted a minor as his heir. Held, the adoption of such minor could not defeat the devise in remainder to the grandchildren under the terms of said will. *Id.*
3. The one-fifth interest in the estate devised to the grandchildren in remainder could not be charged with the debts due by the life tenant to the testatrix. A remainderman takes directly from the testator, and not through the life tenant. *Id.*
4. A testator executed the following will: "I do hereby devise and bequeath, after the payment of my debts, to my dear brothers and sisters equally, share and share alike, all my estate, real and personal, whatsoever and wheresoever." Held, (1) that the heirs of brothers who

Will—*Continued.*

died before the will was made take nothing under said will; (2) that the heirs of a sister who died before the testator take nothing, and (3) that the words "brothers" and "sisters" includes brothers and sisters of the half blood. *Watkins v. Blount*, 460.

5. A devise of property to the trustees of an incorporated church, "for the benefit of the poor, helpless and dependant members and orphan children of said church," was not void because the beneficiaries were insufficiently described; the "poor, helpless and dependants" were a class capable of identification, and baptized children of deceased members, if it was a society practicing infant baptism, were properly described as "orphans of the church." Nolte v. Meyer, 79 Texas, 351, distinguished. *Banner v. Rolf*, 88.
6. Property bequeathed to an incorporated church in trust for charitable purposes is to be managed and the trust administered, not by the body of the members, but by the corporate trustees. Rev. Stats., art. 660. *Id.*
7. The possibility of the trustees of a charitable bequest administering the trust for their personal benefit will not render the bequest void. *Id.*
8. A bequest of ground for the location of a school building and of funds for the support of a school construed, in connection with other bequests for the support of orphan children, as contemplating a school for the education of such orphans. *Id.*

Witness.

Impeaching reputation. See *Evidence*, 7, *31.*

Written Instrument.

Parol evidence to vary. See *Evidence, 1–3.*
Proof of execution. See *Evidence, 23.*
Secondary evidence of contents. See *Evidence, 25.*

1. It is the duty of the court to construe a written instrument and advise the jury as to its effect. *Blair v. Baird*, 134.
2. The general rule that if, on the production of an instrument in writing, it appears to have been altered, it is incumbent on the party offering it to explain this appearance, is modified by the further rule that if there is no peculiar circumstance of suspicion attached to the altered instrument the alteration is presumed to have been made prior to or contemporaneous with its execution, and in such case the burden of proof is on the party attacking the instrument to show that the alteration was made after its execution. *McKenzie v. Barrett*, 451.
3. There were several alterations in a contract introduced in evidence by the plaintiff; the court charged the jury to find for defendants if they believed all the alterations were made by the plaintiff after the contract was executed. Held, the failure to charge that if any one of said alterations was so made to find for the defendant was an error of omission, and a special charge supplying the same should have been requested. *Id.*
4. Defendants who had agreed in writing to pay money on condition of the building of a railroad to their town and the location of its depot within certain specified limits could not defeat recovery thereon by showing that they signed it, relying on representations that the depot would be located on a particular lot within those limits, which was not done. *Williams v. Dallas, C. & S. W. Ry. Co.*, 609.